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No.

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IN THE

Supreme Court of the United States

October Term 1992

ESSEX ELECTRO ENGINEERS, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES E. RALEY

Counsel of Record
for Petitioner
ESSEX ELECTRO
ENGINEERS, INC.

ISRAEL & RALEY, CHARTERED
1019 19th Street, N.W.
Penthouse One
Washington, D.C. 20036
(202) 659-9533

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152

QUESTIONS PRESENTED

1. Whether legislative authority has been delegated to the executive agencies to impose a restrictive definition of the specific statutory term that provides private parties with access to the procedures and rights granted by Congress for resolving claims against those agencies.

2. Whether a restrictive definition in an agency regulation that generates litigation over the meaning of "claim" while frustrating the resolution of the claim itself is reasonable and consistent with the federal purpose and intent mandated by Congress to require the early submission and prompt resolution of the claim.

3. Whether a restrictive "claim" definition in an agency regulation that interferes with a private party's access to the procedures and rights afforded by statute violates fundamental concepts of due process when the regulation is adopted without notice nor any meaningful opportunity to be heard.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	(ii)
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS	(a)
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	12
1. The Decision Below Conflicts with Principles Established by This Court for Applying Separation of Powers to Properly Define a Grant of Legislative Authority by Congress	12
2. The Executive's "Claim" Definition Applied by the Opinion Below has Spawned "Vexatious" and "Ruinous" Litigation Having No Result Other than a Meaningless Frustration of Access to the Procedures and Rights Granted by Congress	39
3. The Imposition of the Restrictive "Claim" Definition in the Agency's "Disputes" Regulation to Bar a Private Party's Access to the Procedures and Rights Afforded by Statute is a Denial of Due Process	57
CONCLUSION	65
APPENDIX	Attached

TABLE OF AUTHORITIES

1. CASES: PAGES

A & J Construction Co., Inc., IBCA No. 2269,87-3 BCA ¶ 19,965 . . 40-41

American Ship Building Co. v. National Labor Relations Board,380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965) 30

Batterton v. Francis, 432 U.S. 416, 97 S.Ct. 2399, 53 L.Ed. 2d 448 (1977) 26,29

B.E.S. Environmental Specialists, Inc. v.U.S., 23 Cl.Ct. 751 (1991) 47-49

B.L.I. Construction Company, Inc., ASBCA Nos. 40855, 40856, 40977, 91-2 BCA ¶24037 53

Board of Governors of the Fed. Reserve Sys.v. Dimension Fin. Corp., 474 U.S. 361 (1986) 24

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 62

Brookfield Construction Company, Inc. v.United States, 661 F.2d 159 (Ct.Cl. 1981) 18-19

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 24

Chrysler Corp. v. Brown,
441 U.S. 281, 99 S.Ct. 1705,
60 L.Ed.2d 208 (1979) 27-30,35

Commissioner v. Acker,
361 U.S. 87, 80 S.Ct. 144,
4 L.Ed.2d 127 (1959) 25

Consumer Prod. Safety
Comm'n v. GTE Sylvania,
447 U.S. 102, 100 S.Ct.
2051, 64 L.Ed.2d 766 (1980) 23

Contract Cleaning
Maintenance, Inc., 811
F.2d 586 (Fed.Cir. 1987) 21,47

CPT Corporation v. U.S.,
25 Cl.Ct. 451 (1992) 47-50

Dawco Construction Co.,
Inc. v. United States, 930
F.2d 872 (Fed.Cir. 1991) . . . 10,11,24,
41-42,48,52

Dole v. United Steelworkers
of America, 494 U.S. 26,
110 S.Ct. 929 (1990) 31

Essex Electro Engineers,
Inc., ASBCA No. 40553,
91-2 BCA ¶23,712 50-51

Facilities Systems
Engineering Corp. v. U.S.,
25 Cl.Ct. 761 (1992) 47

General Electric Co.
v. Gilbert, 429 U.S.
125, 97 S.Ct. 401,
50 L.Ed.2d 343 (1976) 31

Heyl & Patterson, Inc.,
ASBCA No. 40604, 91-2 BCA 23,972 . 51,53

Horner v. Jeffrey, 823
F.2d 1521 (Fed.Cir. 1987) 30-31

Industrial Contractors,
Inc., ASBCA No. 41613,
91-3 BCA ¶24,217 53

Interstate Contractors,
Inc., VABCA No. 3404,
92-1 BCA ¶24,480 54

Isles Engineering &
Construction, Inc. v. U.S.,
Cl.Ct., 1992 WL 104537 (1992) . . . 46-47

J.S. Alberici Construction
Co., Inc., GSBCA No. 10482,
91-3 BCA 24203 54

Kihlberg v. United States,
97 U.S. 398 (1878) 14

Maitland Bros. Co., ASBCA
No. 34632, 91-3 BCA ¶24,246 54

Metric Constr. Co.
v. United States,
1 Cl.Ct. 383 (1983) 22

Morton v. Ruiz, 415 U.S.
199, 94 S.Ct. 1055, 39
L.Ed.2d 270 (1974) 26

National Ass'n of Psychiatric
Treatment Centers for Children
v. Weinberger, 658 F.Supp. 48
(D.C Col. 1987) 60-61

NLRB v. Brown, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965) 26

Northern California Power Agency v. Morton, 396 F.Supp. 1187 (D.C.D.C. 1975), affirmed, 539 F.2d 243 (D.C.Cir. 1976) . . . 63-64

Office of Communication of the United Church of Christ v. Federal Communications Comm'n., 707 F.2d 1413 (D.C. Cir. 1983) . . . 24

Oman Fischbach International, ASBCA No. 41,474, 91-2 BCA 24,018 53

Pender Peanut Corp. v. United States, 20 Cl.Ct. 447 (1990) 25

Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983) 26

Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp., 506 F.2d 467 (9th Cir. 1974) 62

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1966) 26

S&E Contractors, Inc. v. United States, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed.2d 658 (1972) 14-15,57

Servidone Const. Corp. v. United States, 931 F.2d 860 (Fed.Cir. 1991) 22

Services Alliance Systems, Inc., ASBCA Nos. 43568, 43569, 43855-43856, 92- BCA ¶ 55

Straga v. United States, 8 Cl.Ct. 61 (1985) 41

Sun Eagle Corp. v. U.S., 23 Cl.Ct. 465 (1991) 45-46,52

Tecom v. United States, 732 F.2d 935 (Fed. Cir. 1984) 22

T.V.A. v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) 23,31

United States v. Neifert-White Company, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) 21,37

United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951) 21

Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982) 60

Vivitar Corporation v. United States, 761 F.2d 1552 (Fed.Cir. 1985) 29

Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968) 26

WPC Enterprises, Inc. v. United States, 163 Ct.Cl. 1, 323 F.2d 874 (Ct.Cl. 1963) 58

2. CONSTITUTION, STATUTES

U.S. Constitution, Art. 1, Sec. 1 and 8 39

28 U.S.C. §1254(1) 1

Contract Disputes Act of 1978, 41 U.S.C. 601-613 . . . . . PASSIM

Wunderlich Act, 41 U.S.C. §321-322 . 57

False Claims Act, 31 U.S.C. §3729 20,26, 37,38

Public Law 95-563 18

Federal Torts Claim Act 21

Office of Federal Procurement Policy Act, 41 U.S.C. § 401--424 32-38, 42,44,59

Prompt Payment Act, 31 U.S.C. §3903 . 36

Administrative Procedures Act, 5 U.S.C. §551--553 57-63

3. REGULATIONS

48 C.F.R. §52-233-1 . . . . . PASSIM

48 C.F.R. §52.243-1 2

4. LEGISLATIVE HISTORY

S 3178, Section 12 16

S.Rep.No. 1118, 95th Cong.,
2d Sess. 32 (1978) 16-17

124 Cong. Rec. 36267 (1978) 17

5. OTHER SOURCES

Black's Law Dictionary (1968),
rev. 4th ed., pp. 313-14 20

Webster's New World Dictionary
(1968 ed.) 20

Webster's New Collegiate Dictionary,
G. & C. Merriam Company, 1981 20

OFPP Determination, Gov. Contracts
Reports, CCF, ¶92,682 38

OPINIONS BELOW[1]

The Opinion of the Court of Appeals for the Federal Circuit, Essex Electro Engineers, Inc. v. United States, 960 F.2d 1576 (Fed.Cir. 1992), and its unreported orders, appear in the Appendix hereto. The Claims Court Opinion, Essex Electro Engineers, Inc. v. United States, 22 Cl.Ct. 757 (1991), and its Opinion on reconsideration, not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1992. A timely petition for rehearing with a suggestion for rehearing in banc was denied May 12, 1992, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1] Pursuant to Rule 14.1(b), all parties to this proceeding appear in the caption of the case. As required by Rule 29.1, Essex Electro Engineers, Inc., is a small business with no parent company nor any subsidiaries.

STATUTES AND REGULATIONS[2]

United States Code, Title 41:

§ 605. Decision by the contracting officer

(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, but, if made, shall not be binding in any subsequent proceeding....

(b) The contracting officer's decision on the claim shall be final and conclusive

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[2] In accordance with Rule 33.3, page numbers are excluded from this Section.

and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * *

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) [41 U.S.C. §605(a)] from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary

of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

United States Code, Title 31:

§3729. False claims

(c) Claim defined. For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Regulations, CFR Title 48:

§52-233-1 Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a

written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.[3]

* * *

(g) The Government shall pay interest on the amount found due and unpaid from the date the Contracting Officer receives the claim (properly certified if required), or

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[3] The Court of Appeals referred to the same "claim" definition found in the regulations at 48 CFR §33.201.

(2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

STATEMENT OF THE CASE[4]

Claims arose during a contract under which Petitioner, Essex Electro Engineers, Inc. ["Essex"], a small business located in Illinois, was to overhaul and reconfigure 122 mobile electric power plants for the Navy. The basic Contract price with options totaled $4,036,540. [Appendix, below, pp. 21-26]. During performance, three change orders were issued by the contracting officer under the Changes Clause, which specifies that "nothing...shall excuse the Contractor from proceeding with the contract as changed."[5] The claims each related to the additional work required by the change orders on which Essex was forced to proceed and incur costs for many months and even years before a

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[4] There is no issue of fact because the Opinions below were entered on defendant's motion to dismiss for lack of subject matter jurisdiction which was treated as a motion for summary judgment.

[5] Federal Acquisition Regulations ["FAR"], CFR Title 48, §52.243-1 "Changes--Fixed Price."

total amount of more than $2,000,000 was eventually found due and paid on the claims. All three share a common assertion that each submission to the Contracting Officer was a claim under the Contract Disputes Act ["CDA"], and thus began to accrue interest until the amount due was ultimately paid. [Appendix, hereto, pp. 38-39].

1. The Change Orders and Claims

On October 7, 1986, the Contracting Officer issued Change Order A00004 requiring additional work to incorporate listed replacement parts in the contract items. Change Order P00002 had been issued on April 23, 1986, requiring the addition of winterization support equipment. On September 24, 1986, the Contracting Officer also issued Change Order P00004 directing the addition of work on each power plant "over and above" the basic work. The only difference in the "over and above" change order was that Essex

was first required to submit an inspection report with individual increased costs for the work on each unit. [Appendix, hereto, pp. 40, 44-45, 48-49].

On April 13, 1987, Essex submitted a letter to the Contracting Officer which demanded the sum of $448,746.50 for the replacement parts change order, with a certification of the "claim" plainly drafted to conform to the CDA and signed by Essex's president. On April 15, 1987, Essex submitted a letter which was identical to the form of the letter submitted on April 13, 1987, and demanded the sum of $720,546.91 for the winterization equipment change order, with the same CDA certification signed by Essex's president. Enclosed with each letter was a breakdown of the increased costs for each change order. [Appendix, hereto, pp. 41, 46, & below, pp. 94-114].

With respect to the "over and above" change order, after Essex had submitted the reports of the specific change costs for 56 units without action by the Contracting Officer other than to direct that the additional work proceed, on January 26, 1987, Essex specifically identified each of the inspection reports as a "claim." [Appendix, below, p. 90]. None of the individual claims exceeded $50,000.00 and, therefore, none were certified under the CDA. [Appendix, hereto, p. 50 & below, pp. 27-77].

After Essex had been performing the additional replacement parts work for sixteen months and the Contracting Officer had "reviewed" the claim, the parties executed a contract amendment in February 1988, which "definitized" $339,429 as the amount due for Change Order A00004 subject to a reservation of Essex's rights. The amount due was paid in March 1988, after Essex had incurred increased costs and substantially

completed the changed work. [Appendix, hereto, pp. 41-42, & below, pp. 196-198].

After Essex had been performing the support equipment work required by Change Order P00002 for almost three years, in March 1989, the parties executed a contract amendment, which defined $629,657.48 as the amount due and explicitly reserved Essex's right to CDA interest and to claim for delay. [Appendix, hereto, p. 47, & below, pp. 127-128 & 146-148]. In March, 1989, $603,851.04 of the amount due was paid after Essex had incurred the increased costs and completed the changed work, as well as virtually all other work on the entire Contract. [Appendix, hereto, p. 47, & below, pp. 187 & 196-198]. The balance of the amount due on Essex's certified claim was partially paid in April, 1989, with the remainder not paid until July, 1990. [Appendix, below, pp. 102-114 & 204-205].

Beginning with the "over and above" change cost report submitted on March 27, 1987, and continuing for the remaining units, Essex specifically stated that each report was a "claim for an equitable adjustment pursuant to the Contract Disputes Act." [Appendix, hereto, p. 50]. Also, on April 23, 1987, by another notice to the Contracting Officer, Essex confirmed that each submission was a claim under the CDA on which "interest accrues" and Essex's president provided an overall CDA certification and requested a final decision. [Appendix, below, pp. 115-116]. Thereafter, during the next two years, 14 bilateral amendments were sporadically executed by the Contracting Officer during and after Contract performance reflecting the settled amounts due for the "over and above" changed work on each of the units. [Appendix, hereto, p. 51 & below, p. 117]. An average of one year elapsed on each of the 119 claims

resulting from Change Order P00004 before payments were made after the increased costs had been incurred and the completed unit had been shipped to the Government.[6] The total of the amounts that were eventually paid to Essex was $1,118,878.13. [Appendix, below, pp. 158-161].

None of the payments of amounts due on the change order claims included an amount for the accrued CDA interest to the date of payment.

2. Interest on the Amounts Found Due

In May, 1989, Essex submitted three written claims to the contracting officer for the unpaid interest under the CDA on the amounts found due and paid on the claims for Change Order A00004, P00002 and P00004, commencing on the respective claim dates and running until the payment dates. [Appendix, hereto, pp. 42, 47, 51-52]. On October 20, 1989, the Contracting Officer issued

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[6] Three of the original 122 units were eventually terminated for the Government's convenience.

a final decision on the unpaid interest pertaining to the claim for Change Order A00004, which was modified by a second final decision on February 20, 1990. On February 20, 1990, the Contracting Officer also issued a final decision on the unpaid interest on the claim for Change Order P00002. The final decisions were based on calculations reducing the accrued interest from the full interest accrued on the amount found due from the claim date until paid. [Appendix, hereto, pp. 43-44, 47-48]. On two occasions, the Contracting Officer indicated that a final decision would be forthcoming on the unpaid interest on the claims for Change Order P00004, but the Contracting Officer was replaced and no decision had been issued as of the file date of the action below. [Appendix, hereto, p. 52].

The Claims Court found that the "plain import" of the Contracting Officer's final decisions with respect to the unpaid interest is

that she treated the April 13 and April 15, 1987, submissions as claims under the CDA. [Appendix, hereto, p. 52]. However, even the reduced amount of interest in the Contracting Officer's final decisions has never been paid.

3. The Opinions Below

Pursuant to the CDA, 41 U.S.C. §607, Essex initiated the action in the Claims Court for the unpaid interest. On the basis of being bound by Dawco Construction Co., Inc. v. United States, 930 F.2d 872 (Fed.Cir. 1991), the Claims Court denied interest on the more than $2,000,000 in additional work that Essex had been forced to perform and dismissed Essex's complaint. With respect to Essex's certified submissions of April 13 and April 15, 1987, arising from Change Orders A00004 and P00002, the Claims Court held that, "although there was nothing tentative about the assertion of rights, although the CDA was invoked, and although there was no question

that a change order had taken place," the submissions "were not claims" because "negotiations had not clearly been abandoned" and the "amount claimed was not definitely in dispute." The Claims Court viewed Dawco as requiring that the parties "must have reached something approaching impasse... before a claim can arise" thus barring interest under the CDA. [Appendix, hereto, pp. 63-66].

The Federal Circuit affirmed on grounds that had not been briefed or argued in the lower Court or in the appellate proceeding. The Federal Circuit held that Essex's submissions, certified as claims under the CDA and which were ultimately evaluated and resolved by the contracting officer, were not "claims" by an application of other portions of the agency's "claim" definition that a "claim" be (1) a "demand or assertion...in writing, (2) the money must be sought as a matter of right, and (3) the

writing must set forth a sum certain." [Appendix, hereto, pp. 16, 22].

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with Principles Established by this Court for Applying Separation of Powers to Properly Define a Grant of Legislative Authority by Congress.

Neither Court below addressed the intent and purpose of Congress in the CDA and its legislative history. In each instance, the Court simply imposed the executive's definition of "claim" in its "Disputes" regulation.

In order for a private party to invoke the claim resolution procedures and rights afforded by the CDA, Congress only required that a written claim be submitted to the contracting officer with a certification if more than $50,000 was being sought. [Title 41 U.S.C. §§605 & 611]. Nevertheless, the Opinions below uphold an interpretation of the agency's "Disputes" regulation that imposes substantial restrictions

on access to the CDA. Not only must a written claim be submitted to the contracting officer as specified in the CDA, but the Opinions hold that the "claim" cannot exist unless (1) the subject of the claim is somehow already disputed before the claim is submitted, (2) negotiations are at an impasse and have been abandoned, (3) the claim recites a written demand or assertion, (4) the claim seeks money as a matter of right, and (5) the claim sets forth a sum certain. Neither Opinion considers the conflict with Congress in accepting the agency's self-serving regulation that severely restricts the contractor's right to invoke the CDA and forces a choice of either refusing to negotiate or extending unreimbursed credit to the Government for the cost of additional work ordered by the agency and on which the contractor is obligated to immediately proceed.

Twenty years ago this Court last provided guidance regarding a private party's claim rights on a government contract in S&E Contractors, Inc. v. United States, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed.2d 658 (1972). The Court had no difficulty in recognizing that submissions in response to various change orders were "a series of claims to the contracting officer for resolution under the standard disputes clause contained in the contract, asking for equitable modifications of the contract and additional compensation." Id., 406 U.S. at 5, 92 S.Ct. at 1414 (Emphasis added). The Court observed that the "Disputes" clause then included in Government contracts was intended "to provide a quick and efficient administrative remedy and to avoid 'vexatious and expensive and, to the contractor oftentimes, ruinous litigation.' Kihlberg v. United States, 97 U.S. 398, 401 (1878). The contractor has ceded his

right to seek immediate judicial redress for his grievances and has contractually bound himself to 'proceed diligently with the performance of the contract' during the dispute process." The Court further noted that to postpone payment on claims for changes "is to sanction precisely the sort of 'vexatious litigation' which the disputes process was designed to avoid." S&E., 406 U.S. at 8, 92 S.Ct. at 1416.

The "Disputes" regulation that was the subject of S&E was fully consistent with the Wunderlich Act, 41 U.S.C. §321-322, in providing for the finality of a final decision if an appeal was not filed and requiring the performance of work in accordance with the contracting officer's decision pending a resolution of the appeal. S&E, 406 U.S. at 3 nts. 1 & 2, 92 S.Ct. at 1413 nts. 1 & 2. The agency's current definition of "claim", restricting access to the disputes process, did not come until Congress

enacted the CDA with its explicit provisions regarding the timing for processing claims and the private party's right to interest while a claim is pending.

The CDA bill that had been reported out of committees of the Senate (S 3178) stated in Section 12 that "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the claim...accrues until payment..." The Senate Joint Committee Report noted that the contractor's cost of financing ordered additional or changed work was a legitimate business expense and stated that the interest section of the bill:

> ...provides interest to the contractor upon a favorable decision on his claim from the point in time the cause of action raises (arises) or the additional costs are incurred whichever is later, to the date of payment following either a final decision of the agency board or a court of competent jurisdiction, or a settlement between the contractor and the Government prior to a decision by the agency boards or the courts. [S.Rep.No. 1118, 95th

Cong., 2d Sess. 32 (1978); Emphasis supplied].

The bill was then specifically amended to provide for interest to begin on the date when a claim was submitted to the contracting officer and to delete the "whichever is later" language. Sen. Robert Byrd explained that the change was deemed necessary to fix the actual starting date of interest in order to "serve as an incentive for contractors to submit claims as soon as they are identified." [124 Cong. Rec. 36267 (1978)].

This history is counter to any conclusion that Congress intended to equate a claim with a dispute or to impose technicalities on the content of a claim. The evolution of the actual language of the Interest provision demonstrates a contrary intent. A claim could "accrue", i.e., the cause of action could arise with the contractor bearing the cost of financing the additional work, well before a disagreement ever actually existed. The Senate Report establishes

that Congress intended to compensate contractors for such financing costs.

Furthermore, the Act (Pub. L. No. 95-563) does not suggest that "claim" and "dispute" are synonymous terms. The preamble refers to "the resolution of claims and disputes relating to Government contracts." In two paragraphs, §605(a) and Pub. L. No. 95-563, §14, the Act uses the words "claim" and "dispute" separated by the disjunctive "or."

In its seminal decision, Brookfield Construction Company, Inc. v. United States, 661 F.2d 159 (Ct.Cl. 1981), the United States Court of Claims addressed the "important legislative purpose of allowing interest" in the Act. "Congress definitely thought it fair and proper to grant interest to contractors as a 'legitimate cost' of performance." [Footnote omitted].

> "[A]nother essential policy for the allowance of interest was its 'beneficial effect in providing additional inducement for the settlement of claims short of

> litigation...[Citations omitted]. 'The contracting officer should know of the claim in a reasonable amount of time... to give the contracting officer...the opportunity to act so as to limit the dollar exposure in interest.' [Citations omitted]" Brookfield Construction Company, Inc., supra., at 164; Emphasis in original in part.

The Federal Circuit did not even discuss Brookfield in the decision below.

Thus, Congress expressly provided for the private party's access to the claims resolution process and right to interest by the submission of a written claim with a certification if required. The explicit purpose and intent of these provisions was the early submission of claims and to induce a prompt negotiated resolution without resort to litigation. When Congress chose the term "claim" as the threshhold for access to the procedures and rights afforded by the CDA, Congress had knowledge of the meaning of the term it selected.

The word "claim" has a plain meaning that has been defined as "a demand for something rightfully or allegedly due; assertion of one's right to something" Webster's New World Dictionary (1968 ed.); also, an "assertion open to challenge...possible contradiction." Webster's New Collegiate Dictionary, G. & C. Merriam Company, 1981. "Claim" is considered to be a "broad, comprehensive word"; among many accepted meanings are a "legal capability to require a positive or negative act of another person," and a "notice that claimant is claiming compensation and benefits." Black's Law Dictionary (1968), rev. 4th ed., pp. 313-14.

Congress also adopted a very broad definition of "claim" in related legislation. The False Claims Act, Title 31 U.S.C. §3729(c), defines claim as any "request or demand...under a contract" if the Government will reimburse "any portion of the money or property which is

requested..." This Court has explicitly held that "claim" should not be given a narrow reading and should apply to all "attempts to cause the Government to pay out sums of money." United States v. Neifert-White Company, 390 U.S. 228, 233, 88 S.Ct. 959, 962, 19 L.Ed.2d 1061 (1968). In considering the breadth of the provision "any claim against the United States" in the Federal Tort Claims Act, this Court held that such terms involve "broad words in common usage...[t]hey are not terms of art." United States v. Yellow Cab Co., 340 U.S. 543, 548, 71 S.Ct. 399, 403, 95 L.Ed. 523 (1951).

Furthermore, in decisions other than the one below, the Federal Circuit had itself thoroughly reviewed the CDA and its legislative intent with results that conflict with the present Opinions. In Contract Cleaning Maintenance, Inc., 811 F.2d 586, 592 (Fed.Cir. 1987)

[a precedent which was not addressed by the Opinions below], the Court held--

> "We know of no requirement in the Disputes Act that a 'claim' must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. See e.g. Tecom [v. United States, 732 F.2d 935, 936-7 (Fed. Cir. 1984)]; Metric Constr. Co. v. United States, 1 Cl.Ct. 383, 392 (1983). The fact that in those letters the appellant frequently expressed the hope that the dispute could be settled and suggested meeting to accomplish that result does not mean that those letters did not constitute 'claims.'" (Emphasis supplied).

In Servidone Const. Corp. v. United States, 931 F.2d 860, 862 (Fed.Cir. 1991), which also reviewed the intent and purpose of Congress in the CDA but was again ignored by the Court's Opinion below, the Federal Circuit specifically held that the claim receipt date "sets a single, red-letter date for interest on all amounts found due...without regard to when the contractor incurred the costs."

If statutory language is clear, it is ordinarily conclusive. Consumer Project Safety Comm. v. GTE Sylvania, Inc. 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). There is no known recognized authority that incorporates a prerequisite for an existing dispute in the normal and customary meaning of the word "claim." The only source for attaching a special meaning to the word "claim" would be the statute itself or its legislative history. The parameters of the agency's authority are found in the statute. [See, T.V.A. v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); Consumer Prod. Safety Comm'n, supra.] In relying on the agency's interpretive regulation, the Court below contradicted the fundamental principles of statutory construction established by this Court and reiterated in decisions of the Federal Circuit itself.

In the only precedent cited by the Federal Circuit, other than Dawco, this Court had found that in appropriate circumstances a court may accord weight to an interpretation by an agency with expertise when a statute is ambiguous. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). On the other hand, courts should refuse to enforce agency interpretations when the statute is not ambiguous and does not demand expertise of an agency or when the interpretation does not accord with the thrust of the statute. Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986). As was said in Office of Communication of the United Church of Christ v. Federal Communications Comm'n., 707 F.2d 1413, 1422-23 (D.C. Cir. 1983), "[t]o do otherwise would risk diluting the judiciary's power to stand guard against bureaucratic excesses by ensuring that adminis-

trative agencies remain within the bounds of their delegated authority. Indeed, it is the quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority."

The Court must examine carefully allegations that an agency transgressed its statutory jurisdiction. Pender Peanut Corp. V. United States, 20 Cl.Ct. 447, 452 (1990). [FDA attempted enforcement of a regulation imposing a penalty for a failure to dispose of excess peanuts--"This regulation 'must therefore be regarded as no more than an attempted addition to the statute of something which is not there.' [Commissioner v.] Acker, 361 U.S. [87,] at 94, 80 S.Ct. [144,] at 148, [4 L.Ed.2d 127 (1959)]." Pender Peanut Corp, 20 Cl.Ct. at 455.

In not hesitating to strike down restrictive regulations, the Court in Planned Parent-

hood Federation of America, Inc. v. Heckler, 712 F2d 650 (D.C. Cir. 1983), stated--

> "We will declare regulations in excess of statutory authority if they 'bear no relationship to any recognized concept of" the particular statutory terms at issue. Batterton v. Francis, 432 U.S. 416, 428, 97 S.Ct. 2399, 2407, 53 L.Ed.2d 448 (1977). Agency action must be found to be consistent with the congressional purposes underlying the authorizing statute. See id.; Morton v. Ruiz, 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1966)." See, also, NLRB v. Brown, 380 U.S. 278, 291-92, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968).

The term "claim" in the CDA is not ambiguous. The framers of the Act clearly believed that anyone could determine the plain meaning of such a common term by consulting a dictionary, the False Claims Act, or decisions of this Court. If the agency had any valid doubt regarding a party's intent to submit a claim, that doubt could be readily resolved by simply asking if a "claim" was intended. Here, Essex

clearly, emphatically and repeatedly informed the agency that "claims" under the CDA were intended.

In Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), which was disregarded by the Court below, this Court provided a clear definition of the limits on the executive agencies' authority to adopt regulations as interpreting or implementing legislation enacted by Congress. The Court first distinguished between substantive rules, which affect "individual rights and obligations" and, if authorized, have the force of law, and those interpretive rules, which are "general statements of policy" and do not have the force and effect of law. [Id., U.S. at 301-2, S.Ct. at 1717-18]. In determining whether there has been a Congressional grant of "legislative authority" for substantive rules, the Court declared--

> "...in order for such regulations to have the 'force and effect of law,' it is nec-

> essary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress...The pertinent inquiry is whether under any of the arguable statutory grants of authority the...regulations relied on by the respondents are reasonably within the contemplation of that grant of authority." [Id., U.S. at 304-5, S.Ct. at 1718-19].

Finding no specific Congressional reference to the legislative authority claimed by the agency in Chrysler Corp. [Id., U.S. at 306, S.Ct. at 1720], the Court held--

> "...the thread between these regulations and any grant of authority by the Congress is so strained that it would do violence to established principles of separation of powers to denominate these particular regulations 'legislative' and credit them with the 'binding effect of law.'" [Id.].

Chrysler Corporation has been repeatedly cited as the standard against which the existence of legislative authority for a regulation will be determined. The Federal Circuit itself has not hesitated to limit or invalidate regulations in other contexts.

In Vivitar Corporation v. United States, 761 F.2d 1552 (Fed.Cir. 1985), involving trademark rights, the Court below held that a regulation lacked the force of law unless Congress specifically entrusted "an agency with the duty to exercise its judgment under guidelines set forth in a statute, and to fill in the extent of protection thereunder. Batterton v. Francis, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977)." The Federal Circuit held that "[w]ithout such authority,...regulations cannot affect the actual scope of... rights...under the statute." Citing Chrysler Corp., supra., the Court noted that legislative authority may sometimes be found without a specific grant "if it is clear from 'the language and logic of the [statute] and its legislative history' that such authority was contemplated." Vivitar Corp. v. United States, 761 F.2d at 1568-69.

In Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987), involving credit for service by a retiree, the Court below again applied Chrysler Corp., supra., to set aside an agency interpretation. Starting with the premise that the "task of rewriting a statute is and should remain a duty reserved for Congress," the Court held that "'deference ...should not be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' (quoting American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965))." [Horner, at 1527-28].

The Court then recited the "two requirements" set out in Chrysler Corp., 441 U.S. at 301-304--

> "...for any agency regulation to have the force and effect of law, it must first prescribe 'substantive' or 'legislative' rules rather than merely 'interpretive

> rules, general statements of policy, or rules of agency organization, procedure, or practice.'...Second, its promulgation must be pursuant to a specific statutory grant of authority and 'must conform with any procedural requirements imposed by Congress.'" Horner, at 1529.

In rejecting the agency's interpretation, the Federal Circuit held--

> "It is already established that an interpretive regulation which is contrary to the plain meaning of the statute that the regulation interprets, as well as to the statute's legislative history, cannot be sustained. General Electric Co. v. Gilbert, 429 U.S. 125, 145, 97 S.Ct. 401, 412-13, 50 L.Ed.2d 343 (1976)... A regulation which is issued without any legislative delegation of authority, which interprets a statute that needs no interpretation, and which also conflicts with another statute cannot be sustained." Horner, at 1530. See, also, T.V.A. v. Hill, 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296 n. 29, 57 L.Ed.2d 117 (1978); Dole v. United Steelworkers of America, 494 U.S. 26, 110 S.Ct. 929, 934 (1990).

Yet, here, in the context of the procedures and rights granted by the CDA, the Federal Circuit upheld the agency's restrictive "claim" definition only on the basis of an interpretation of authority in the Office of Federal

Procurement Policy Act [41 U.S.C. § 401 et seq. 24] ("OFPP Act"). [Appendix, hereto, pp. 13-14].

In the OFPP Act, Congress delegated only specific areas of limited authority to the executive subject to repeated directions to give "due regard to applicable laws." The OFPP Act explicitly mandates --

> "Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this Act, shall be assigned, delegated, or transferred to the Administrator." [Id., §405(g)].

There is not one single reference in the OFPP Act to the CDA nor to any assignment, delegation or transfer of any duties, functions, or responsibilities with respect to the CDA. The Court below even acknowledged that the "OFPP Act does not explicitly mention the CDA..." [Appendix, hereto, at p. 13]. Giving "due regard to applicable laws," a review of the CDA shows that Congress did not give any blanket

grant of authority to the OFPP. Congress permitted the executive agency to draft a clause limited to providing that the contractor must proceed with the work pending a resolution of his claim by a board or court or a "final settlement." [41 U.S.C. §605(b)]. Congress also permitted the agency to adopt a regulation to fix a "reasonable" time for decisions on claims [Id., §605(c)(3)]. Finally, Congress granted authority specifically to the OFPP only to the extent of permitting "guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards..." [Id. §607(h)]. Congress granted no authority in the CDA to impose a regulation setting forth a restrictive definition of a substantive term in the Act to frustrate access to the procedures and rights afforded in the Act.

Notwithstanding the foregoing explicit provisions, the Court below found that Congress

"does broadly authorize the executive to issue regulations, including regulations affecting the CDA [in] Subsection 405(a)" of the OFPP Act. Based on a partial quote from Subsection 405(a), the Federal Circuit concluded that there was authority to define the term "claim" in the CDA and that the executive was authorized to "elaborate" on the interest provision of the CDA by altering the date from which interest would accrue. [Addend. pp. 5, 13-14]. No authority was cited for the Court's conclusion.

A full quote of Section 405(a) from the OFPP Act actually reinforces the limitations on the executive rather than creating a blanket expansion of authority. That Section applies only to "carrying out the policies and functions set forth in this Act" subject to the repeated mandate to give "due regard for applicable laws" and provides merely that the "Administrator may prescribe Government-wide procurement policies"

to be "followed by executive agencies in the procurement of--(1) property...; (2) services...; and (3) construction..."

There is nothing in the "policies and functions set forth" in the OFPP Act nor in any "applicable law," including particularly the CDA, by which Congress delegated to the executive the power to define or "elaborate" on a statutory right of a private party for access to claims resolution procedures and rights under the guise of being a procurement "policy" to be followed by "executive agencies." Further, the term "policy" itself does not encompass defining or altering a private party's substantive statutory rights. Chrysler Corp. v. Brown, 441 U.S. at 301-2, 99 S.Ct. at 1717-18.

The conclusion that Congress did not delegate any power to the executive agencies to define or alter the statutory rights vested by Congress in the CDA is further reinforced by

recognizing that none of the specific delegations concerned the content of a "claim." Why would Congress make specific limited delegations in the CDA, if a blanket delegation may be found in a general policy provision of the OFPP Act?

The lack of a blanket delegation under the CDA is also confirmed by recognizing that, if it had intended to do so, Congress clearly knew how to make a blanket delegation of regulatory authority to the OFPP because it did so in the Prompt Payment Act [31 U.S.C. §3903]. Yet, Congress chose not to make a blanket delegation under the CDA and incorporated only the specific and limited grants of authority identified above.

The legislative history of the CDA provides a clear insight into the intent of Congress that "claim" must have the broadest possible meaning. Submission of a written claim and providing interest were specifically intended to encourage

early submissions and to induce prompt negotiated resolutions without litigation. In order to discern the broad form that Congress intended for the term "claim", one need only look to the related False Claims Act in which Congress defined "claim" as "any request or demand...for money or property." [31 U.S.C. § 3729(c)], which this Court defined as encompassing "all attempts to cause the Government to pay out sums of money" [United States v. Neifert-White Co., 390 U.S. at 233, 88 S.Ct. at 962].

The Federal Circuit's grant of blanket authority to the executive to restrictively define the content of "claim" raises an additional substantial conflict with another statute. Here, Essex submitted written requests for the payment of money, which set forth specific sums and recited that they were "claims" under the CDA and, when the specific sums required, included CDA certifications. Yet, the Court

below held that Essex's submissions are not "claims" as defined by the executive agencies. If another party made such a submission that was then established to be false or fraudulent, would the executive's restrictive "claim" definition and the Opinions below bar the executive's access to the False Claims Act or the CDA [41 U.S.C. §604] or provide a defense by that party to a false claim action the executive might attempt to bring?

The Court below upheld the agency's concept of requiring a dispute before the claim is presented even though the OFPP has explicitly taken the contrary position. On 28 January 1983, the OFPP declared that "The Act does not require that a claim be 'disputed by the other party', nor does it require that a claim be submitted under the "Disputes clause." [Appendix, hereto, pp. 75-76; Emphasis supplied]. Accordingly, the Federal Circuit has upheld an

interpretation that the agency itself has contradicted.

The Opinions below overlook or misapprehend the lack of a grant of legislative authority to the executive agencies and the resulting conflict with principles of legislative authority and the separation of powers [U.S. Constitution, Art. 1, Sec. 1 and 8] established by decisions of this Court and strictly followed in other decisions of the Federal Circuit itself.

These conflicts and contradictions with the Congressional purpose and intent justify the grant of certiorari to review the Opinions below.

2. The Executive's "Claim" Definition Applied by the Opinions below has Spawned "Vexatious" and "Ruinous" Litigation Having No Result Other than a Meaningless Frustration of Access to the Procedures and Rights Granted by Congress.

Only one term in the CDA was selected by the executive agency for an interpretive defini-

tion to be imposed on all Government contractors--the word "claim." The executive agency required that an impasse or dispute somehow exist before the existence of the claim itself and that the submission conform to a series of technicalities having nothing to do with the merits of the claim. The transparent reason for the agencies to pursue this course is found in recognizing that the existence of a dispute depends entirely upon the conduct of the agency. By the simple expedient of withholding an expression of actual disagreement, the executive agencies have produced contradictory board and court decisions all based on the agency's introduction of the inherently ambiguous concept that a "dispute" must somehow exist before the subject of the dispute has been presented in a claim. [See, i.e., citations in A & J Construction Co., Inc., IBCA No. 2269, 87-3 BCA ¶

19,965, at pp. 101,078-079; and Straga v. United States, 8 Cl.Ct. 61, 66-68 (1985)].

In the absence of guidance by this Court, every contractor who wishes to avail himself of the CDA faces the risk of being eliminated by boards or courts that have been blinded by the rhetoric in a flurry of motions based on pinning a "request" or "proposal" label on claims and imposing a "dispute" as a prerequisite. By not expressing a disagreement, the agencies thus control the timing of when, if ever, the merits of the contractor's rights will be resolved.

The Claims Court below relied only on a panel decision in Dawco Construction Co. v. United States, 930 F.2d 872 (Fed. Cir. 1991) to eliminate Essex. [Append. hereto, pp. 60-63, 72]. In viewing itself as bound by Dawco, the Claims Court below did not reference or address any part or aspect of the foregoing provisions of the CDA nor its legislative history. Dawco

was based only on selected phrases from "claim" definitions in three sequential "Disputes" regulation versions without regard for the agencies' lack of authority under the OFPP Act or the CDA to regulate any abnormal "claim" definition. The Claims Court below dismissed Essex because the element it considered as distinguishing a claim "is that negotiations had clearly been abandoned, and the amount claimed was definitely in dispute." [Appendix, hereto, p. 66; Dawco, 930 F.2d at 879; Emphasis supplied].

The holding that a contractor must refuse to negotiate in order to have a CDA claim is a direct contradiction of the legislative history which stresses the need to encourage prompt submission and settlement of claims and fixed the interest provision precisely for that purpose. The Opinions below thus adopt a truly ironic premise. By the simple expedient of

publishing an abnormal and self-serving definition of the familiar term "claim", the executive agencies successfully regained their superior bargaining power, particularly with respect to a small business such as Essex, by having total control over the existence of a "claim" and consequently the start of determining the merits of the claim and the start of the accrual of interest. The executive agencies have been thus permitted to turn the event selected by Congress to "provide a specific date from which interest will be paid" into a variable date and to turn the benefit intended to "serve as an incentive" for early submission and settlement of claims into an incentive to delay claim submittal and abandon settlement efforts. The Opinions below stand for the proposition that the contractor must refuse to negotiate and, perhaps, refuse to diligently proceed with performance resulting in a risk of a default, simply to avoid financing

increased costs ordered by the Government without the right to be paid the interest that Congress believed it had established more than fourteen years ago.

Despite the Federal Circuit's decision to use the technicalities in the agency's definition of "claim" rather than to directly address the Claims Court's reliance on the Dawco requirement to "abandon" negotiations and create a "dispute", the Federal Circuit's opinion nevertheless affirms the incongruous result that Congress somehow left a "black hole" or some "grey area" [Appendix, hereto, p. 73] through which a contractor's statutory rights against the executive can be arbitrarily avoided or eliminated by an executive's regulation.

Moreover, the Federal Circuit's failure to acknowledge and address the authority limitations in the OFPP Act and the intent and purpose of the CDA and its legislative history has

spawned Claims Court and administrative Board decisions that blindly apply the Opinions below and the executive's regulation with many conflicting, arbitrary and irrational results. Litigation over litigation has become the norm. The resolution of the merits of the private party's claims and rights is being repeatedly frustrated and avoided for months and even years by a diversion into the agencies' meaningless semantic conundrum of whether a claim is a "claim."

In Sun Eagle Corp. v. U.S., 23 Cl.Ct. 465 (1991), the Court rejected another contractor's CDA claim. Based on the premise that negotiations must be clearly abandoned, the Claims Court examined the record not to discern the merits of the claim, but rather to determine whether the parties were blatantly hostile and adverse on each issue comprising the submission in order to find a "claim." The result of the

Court's efforts was a conclusion that "...nothing in the record indicates that the parties viewed this item as nonnegotiable...[or] nothing in the record reflects either the contracting officer's or plaintiff's unwillingness to discuss this issue." Also, "...the last contact between the parties was an amicable September 14 letter from plaintiff..." Sun Eagle, 23 Cl.Ct. at 473. Almost three years after the contractor's written submission to the contracting officer, the Court's exploration into the "claim" definition arena in Sun Eagle thus provided no assistance to a resolution of the merits.

Conflicting with the Claims Court's comments in Sun Eagle, the Court in Isles Engineering & Construction, Inc. v. U.S., 26 Cl.Ct. 240 (1992), stated "the fact that plaintiff's May 9, 1988 letter also suggested the possibility or hope, for a negotiated solution to the dispute

did not detract from its validity of perfecting plaintiff's claim under the CDA." The court in Contract Cleaning, 811 F.2d at 592, "found that an expressed desire to negotiate a solution to the dispute did 'not mean that those letters did not constitute claims.'" Isles, at 243[7] Although the contractor's claim was preserved in Isles, the excursion into the "claim" semantics did not conclude until four years after the claim was submitted and only then was the contractor permitted to proceed to a resolution on the merits.

On the other hand, in B.F.S. Environmental Specialists, Inc. v. U.S., 23 Cl.Ct. 751 (1991), letters submitted by the contractor were not "claims" under the CDA. Although the first

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[7] But see Facilities Systems Engineering Corp. v. U.S., 25 Cl.Ct. 761 (1992)("dispute arises only when the parties have reached an impasse in their negotiations"); and CPT Corporation v. U.S., 25 Cl.Ct. 451 (1992)("claim" denied in part because the contractor indicated a willingness to continue negotiating).

request of November 9, 1988, was properly certified, the Court held that it was not a claim because of the "strong requirement that a request for payment be tangibly disputed." B.E.S., 23 Cl.Ct. at 753. The Court then observed that a "Feb. 27, 1989 letter from the contracting officer... specifically denied BES's request for payment. At this point, a bona fide dispute between the parties existed, satisfying the Dawco requirement." Id. at 753. Lastly, the Court considered "whether a viable claim was made after the dispute arose on Feb 27, 1989. BES submitted a letter to the EPA on July 6, 1989 asserting that its Nov 9 letter was a claim and requesting a final decision by the contracting officer. The July 6, 1989 letter was not certified." Id. at 753. In spite of the proper certification of the November 9, 1988 letter, and the Contracting Officer's complete denial, the Claims Court in B.E.S. held that "absent

certification, the July 6, 1989 letter does not constitute a CDA claim." Id. at 754. Thus, after almost three years, the contractor still had no decision on the merits of his claim and no interest for that period.

The same judge who decided Isles, supra, also authored CPT Corporation v. U.S., 25 Cl.Ct. 451 (1992). The contractor made a written submission to the contracting officer dated June 13, 1989, pursuant to the CDA, for an unpaid sum under the contract and requested a final decision. Almost three years later, on March 13, 1992, the Court applied the Claims Court Opinion below sua sponte to find no CDA "claim" even though the Government had not challenged CDA jurisdiction. CPT, 25 Cl.Ct. at 454. "The fact that a contractor 'referred to a submission as a claim, or treated it as such,' does not mean that the contractor's designation will have controlling legal significance. Essex Electro

Engineers, Inc., 22 Cl.Ct. at 759-760...Plaintiff's repeated invocations of the CDA and requests for written decisions were apparently tools to goad the government into action, rather than bona fide claims. Communications never ceased..." CPT, 25 Cl. Ct. at 455. In addition, a claim for interest under the Prompt Payment Act was made subject to the same "claim" definition applied to the CDA and letters demanding Prompt Payment Act interest were also found not to be "claims". Id., at 456.

The confusion and irrational results spawned by the Opinions below also extend to the Administrative Boards. In Essex Electro Engineers, Inc., ASBCA No. 40553, 91-2 BCA ¶23,712, the agency moved to dismiss alleging no "claim". Essex's written submission had been made to the contracting officer on August 19, 1987, and was certified as a CDA claim for $881,569. The appeal to the Board was filed March 9, 1990,

because of inaction by the agency. On January 10, 1991, the Board denied the motion to dismiss holding that "there are no 'magic words' that need be said" for a claim. Essex was finally allowed to proceed on the merits three and one-half years after the submission of its claim.

On the other hand, the same administrative judge that denied the motion in Essex, supra., granted a government motion to dismiss that was filed one week before the scheduled hearing in Heyl & Patterson, Inc., ASBCA No. 40604, 91-2 BCA 23,972. The contractor's written submission to the contracting officer dated March 23, 1988, included additional copies of an earlier "claim" of November 3, 1987, an addendum of January 28, 1988, and a certification as a CDA claim for $770,293. The Board's decision found the earlier certification of the November 3, 1987 claim inadequate because the word "supporting" was not included and ordered additional evidence

on the adequacy of the certification of the March 23, 1988, claim. The Board's next decision of July 31, 1991, granted the agency's motion and found no "claim"-- "a claim must seek payment of a sum certain as to which a dispute exists at the time of submission" [Dawco Construction Co., supra.]; "the parties must have reached something approaching impasse on some of the elements of the contractor's demand before a claim can arise" [Essex Electro Engineers, Inc., supra., 22 Cl.Ct. 757 (1991)]; "A claim only exists when the parties clearly have abandoned negotiations and the amount is definitely in dispute" [Sun Eagle Corp., supra.]; "use of the term 'claim' does not, in the absence of other factors, render the...letter a claim" [Sun Eagle, supra.]; "submission of a certification, even one proper in form and execution, does not transform the...letter into anything more than a cost proposal" [Dawco,

supra.]; "Of course, the issuance of a 'final decision' by the contracting officer is no help where there is no CDA claim" [B.L.I. Construction Company, Inc., ASBCA Nos. 40855, 40856, 40977, 91-2 BCA ¶24037].

Thus, the existence of a "claim" was denied in Heyl & Patterson, supra., more than three years after the submission which had been certified as a claim thus proceedings on the merits of the claim were frustrated. See, also, Industrial Contractors, Inc., ASBCA No. 41613, 91-3 BCA ¶24,217 [Board's July 23, 1991 decision dismissed action on a June 27, 1989, submission with a CDA certification of $1,346,361, finding that the contractor's efforts seeking to pursue settlement negotiations did not preserve the existence of a "claim"]; Oman Fischbach International, ASBCA No. 41,474, 91-2 BCA 24,018 [Board's May 15, 1991, decision dismissed appeal on ground that the certified submission of

November 14, 1988, was not a "claim"; "we cannot regard either appellant's certification, or respondent's later characterizations of the submission as a claim, as dispositive"]; J.S. Alberici Construction Co., Inc., GSBCA No. 10482, 91-3 BCA 24203 [Board's July 15, 1991 decision found no "claim" in a "claim book" submitted in September, 1988, with a CDA certification of $3,093,585.61, and that the contracting officer's final decision was not authorized because negotiations had occurred]; Maitland Bros. Co., ASBCA No. 34632, 91-3 BCA ¶24,246 [After further briefing and argument, on July 22, 1991, the Board decided its own sua sponte question of its own previous decision that had sustained the Appeal on November 26, 1990, based on whether a "claim" had existed in the contractor's submission of March 13, 1986]; Interstate Contractors, Inc., VABCA No. 3404, 92-1 BCA ¶24,480 [contracting officer's final deci-

sion was found not valid because the contractor's submission of "listed charges" was not considered a "claim."]; Services Alliance Systems, Inc., ASBCA Nos. 43568, 43569, 43855-43856, 92-2 BCA ¶ _____ (1992 WL 84432) [On April 20, 1992, Board decided that "over two hundred" letters during 1990 protesting a diversion of work as violating contract terms were not claims because they "did not ask for money" and contractor's submission of February 8, 1991, for $243,463.12 with a proper CDA certification was not a claim because it was not the subject of a pre-existing dispute, therefore the contracting officer's final decision for a small fraction of the amount demanded was considered not valid and the Government motion to dismiss was granted].

Essex made written submissions to the contracting officer identified as claims under the CDA and certified as such when the specific

sum claimed exceeded $50,000 and the contracting officer understood, evaluated and, after many months and even years, eventually resolved Essex's submissions by entering settlements and making payments of the amounts found due. The "plain import" of the Contracting Officer's subsequent final decisions was a recognition that interest was due on proper CDA claims.

No reading of the CDA or its legislative history would countenance a necessity or requirement that the private party refuse to participate in settlement negotiations or otherwise participate in the creation of an impasse or dispute so that a CDA claim and the right to interest could be preserved. The Opinions below have spawned confused, conflicting and irrational decisions that are frustrating and avoiding a timely resolution of the merits of private parties' contract claims and are directly producing the "vexatious and...

oftentimes, ruinous litigation" about which this Court warned in the last claims guidance that was provided more than twenty years ago. S&E, supra. These irrational results produced by meaningless litigation justifies the grant of certiorari to review the Opinions below.

3. The Imposition of the Restrictive "Claim" Definition in the Agency's "Disputes" Regulation to Bar a Private Party's Access to the Procedures and Rights Afforded by Statute is a Denial of Due Process.

The executive's regulations that pertain to contracting with the Government are adopted in virtual secrecy as being exempt from the rule-making provisions of the Administrative Procedures Act ("APA") [5 U.S.C. § 553(a)(2)]. In spite of the specific limited authority delegated in the CDA, the executive agencies did not simply echo the statutory language, as had been done previously with the Wunderlich Act. The agencies decided, instead, to adopt a different

approach for a "Disputes" regulation to be imposed on contractors without notice or any hearing.

The abnormal "claim" definition drafted by the executive agencies can be found in no dictionary, is not used in the related "False Claims Act" and is in conflict with decisions of this Court addressing the term in related legislation. The agencies' drafted definition is inherently ambiguous as established by the past fourteen years of conflicting, contradictory, and confusing decisions by the boards and the courts. For this reason alone the regulation must be strictly construed against the drafter and governed by the plain and literal meaning of the "claim" and "interest" provisions in the CDA as intended by Congress. WPC Enterprises, Inc. v. United States, 163 Ct.Cl. 1, 323 F.2d 874 (Ct.Cl.1963).

Essex believed that its demands were CDA "Claims", certified as required, on which CDA interest was accruing. At all contemporaneous times until the agency embarked on its litigation position, the "plain import" of the contracting officer's actions was an admission that interest was due on the subject claims as proper CDA claims.

Perhaps more important is the recognition that the "Disputes" regulation purports to be a general policy statement mandated for all parties for which no authority has been vested under the specific provisions of the OFPP Act and the CDA. The Federal Circuit could point to no authority for the regulation other than by contradicting major decisions of this Court and the Federal Circuit itself, in finding an implication of authority in a general policy pronouncement of a section of the OFPP Act even

though it contained no reference whatsoever to the CDA.

The agency's definition that is beyond the scope of the statute and its history required rule-making procedures before it could be lawfully enforced. Exceptions to or exemptions from APA requirements must be narrowly construed. [See Vigil v. Andrus, 667 F.2d 931, 937 (10th Cir. 1982)]. The "contracts" exemption from rule-making requirements is not applicable where the issue is an agency's prospective changes to proscribed law or established policy as applied to the contents of all agreements entered by the Government with private parties. [See, 5 U.S.C.A. §§ 551(4), 553(a); National Ass'n of Psychiatric Treatment Centers for Children v. Weinberger, 658 F.Supp. 48 (D.C Col., 1987):

> "As the definition indicates, APA 'rules' are characteristically of general applicability, and are prospectively effective. Rulemaking action by an agency generally

> does not apply previously set standards or policies to past facts or situations, but establishes a new standard or policy to apply to future facts. Rulemakings impose obligations on or affect groups, not only isolated persons. [citations omitted]." Id., at 53.

Where, as here, an agency takes action which prospectively affects the calculation and payment of Congressionally established rights or benefits, rulemaking requirements are applicable. [Id., at 54]. The failure of the executive agencies to comply with the rule-making procedures of the APA in either the drafting or application of their purported general policy regulation renders it unenforceable as a denial of administrative due process.

Blind application of the regulation to deny access to a procedure and right to interest that has been specifically granted by Congress is a denial of substantive due process as well. A denial of substantive due process is established if the party's liberty or property interests

have been invaded by government action without an opportunity to challenge that invasion and the purported justification for the invasion is improper. [U.S. Constitution, Amend. 5; Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp., 506 F.2d 467 (9th Cir. 1974).

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court described the kind of property interests protected by the due process clause:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' (408 U.S. at 577, 92 S.Ct. at 2709.)"

Finally, even if the agency "claim" definition could be viewed as validly within the "contract" exemption in the APA, the imposition of that definition as a bar to private parties' access to the procedures and rights afforded by the CDA is void as a denial of fundamental procedural

due process which has been unaffected by the APA. If the Opinion below is correct in contradicting the foregoing authorities by holding that "nothing in the APA limits the 'public contracts' exemption" [Appendix, hereto, p. 18], the fact remains that "Congress did not intend [the APA] to abolish procedural due process, but rather to enhance it..." Northern California Power Agency v. Morton, 396 F.Supp. 1187, 1194 (D.C.D.C. 1975), affirmed, 539 F.2d 243 (D.C. Cir. 1976). Here, as in Northern California Power Agency, if the APA exemption is applicable, the "claim" definition was adopted by the agencies in a situation "[w]here procedures were not fixed...; where not all the important technical data ultimately relied on were made available for full public comment; where [agency] experts made off-the-record presentations to the decision-maker...; and where the decision-maker never spelled out a detailed rationale for

his decision...[thus] the meaningful opportunity to be heard required by due process was denied." Blind application of the regulation as a mandatory requirement is thus barred. Id., p. 1194-95.

Here, a contractor's right to interest on a claim, certified if required, during the period that he is required to proceed with performance of changed or additional work pending settlement and payment is specifically mandated by the CDA and its legislative history. A denial of this right by a non-statutory prerequisite for an undefined pre-existing "dispute", abandonment of negotiations, and semantic technicalities based on a regulation not subjected to due process safeguards is a clear invasion of interests established by Congress. The only "reason" that could exist for such an invasion is the unauthorized self-serving avoidance or reduction of the agency's

obligation to promptly proceed with settlements and to pay the Congressionally established benefit, thus violating the mandates of Congress.

This consummate denial of due process justifies the grant of certiorari to review the Opinions below.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that certiorari be granted.

Respectfully submitted,

By: _____

Charles E. Raley
ISRAEL AND RALEY, CHARTERED
1019 19th Street, N.W.
Penthouse One
Washington, D.C. 20036
Counsel for Petitioner

August 10, 1992

APPENDIX

TABLE OF CONTENTS

DOCUMENT	PAGES
Essex Electro Engineers, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992), Opinion, April 5, 1992	1-28
Essex Electro Engineers, Inc. v. United States, not reported, (Fed.Cir. 1992), Order on Petition for Rehearing, May 12, 1992	29-30
Essex Electro Engineers, Inc. v. United States, not reported, (Fed.Cir. 1992), Order on Suggestion for Rehearing in banc, May 26, 1992	31-32
Essex Electro Engineers, Inc. v. United States, 22 Cl. Ct. 757 (1991), Opinion, April 5, 1991 .	33-69
Essex Electro Engineers, Inc. v. United States, not reported, (1991), Opinion on Motion for Reconsideration, April 25, 1991	70-73
OFPP Determination, Gov. Contracts Reports, CCF, ¶92,682	74-75

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

91-5096

ESSEX ELECTRO ENGINEERS, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES
Defendant-Appellee

Decided: April 17, 1992

Before ARCHER, Circuit Judge, BENNETT, Senior Circuit Judge, and MICHEL, Circuit Judge.

Essex Electro Engineers, Inc. appeals the summary judgment of the United States Claims Court denying Essex's claim for interest under the Contract Disputes Act (CDA). Essex Electro Engineers, Inc. v. United States, 22 Cl. Ct. 757 (1991). The Claims Court held that Essex's submissions were not CDA claims entitling Essex to interest because there was no dispute at the time they were made. However, we hold that the submissions are not claims because they did not

seek a sum certain as a matter of right as required by the Federal Acquisition Regulation (FAR) which implements the CDA. Nevertheless, because the Claims Court correctly concluded that the government was entitled to judgment as a matter of law, we affirm.

I. BACKGROUND

Essex contracted with the Naval Regional Contracting Center to overhaul and reconfigure 122 mobile electric power plants. Three change orders were issued during performance of the contract. The principal amounts due to Essex under the three change orders have been paid as a result of an administrative settlement. Essex now seeks interest on those amounts from the date it made submissions purporting to be claims under the CDA.

A. The 100 Percent Replacement Parts Change Order

The first change order required that certain parts be subject to a 100 percent replacement requirement. In response to a letter from the Administrative Contracting Officer (ACO) requesting a cost proposal for such a change, Essex submitted a cost proposal on February 14, 1986. On October 7, 1986, without ruling on Essex's proposal, the ACO unilaterally executed the change order which provided that "[a]n equitable firm-fixed price for this change order shall be negotiated with an appropriate Supplemental Agreement."

On April 13, 1987, Essex submitted a revised cost proposal which reduced the amount proposed earlier and noted that

> prices are based upon purchase orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor and engineering time and cost will be.

Although the letter contained a certification in the form required by section 605 of the CDA, it did not request a final decision by the ACO.

In February 1988, the parties "definitized" the change order by executing an amendment to the contract. The "firm-fixed price" for the change order that was agreed to was less than that offered by Essex in its revised proposal. Upon Essex's submission of an invoice for the amount due under the amendment to the contract, the government made payment on March 14, 1988.

On May 25, 1989, Essex sent a letter to the ACO which purported to be a "claim for interest due on the payment made on the certified claim arising from the referenced Change Order. We request your final decision on this claim within sixty days in accordance with the [CDA]." Essex based this claim for interest on its April 13, 1987 submission of a revised cost proposal and

requested interest for the period commencing with that date.

Without determining whether the April 13, 1987 submission was a CDA claim, which would entitle Essex to interest, the ACO allowed a limited amount of interest. Elaborating on the interest provision of the CDA, the FAR allows "interest on a contractor's claim on the amount found due and unpaid from (a) the date the contracting officer receives the claim . . . or (b) the date payment otherwise would be due, if that is later . . . ." 48 C.F.R. § 33.208 (1991). Because payment ordinarily would be due 20 days after receipt of an invoice, and because shipment preceded the invoice, the ACO calculated interest for each shipment for the period beginning 20 days after acceptance of the shipment until final payment. To arrive at the final interest amount due, the ACO also credited progress payments to the principal payments as

they came due. The final interest amount found to be due, however, has not been paid by the government.[1]

B. THE SUPPORT EQUIPMENT CHANGE ORDER

The same basic sequence of events occurred with respect to the second change order. On April 23, 1986, the ACO issued a unilateral modification to the contract. This change order required that the contractor furnish material, parts, labor and services for the incorporation of "winterization kits" into each of the mobile power plants. It also required that Essex submit a price proposal within 30 days. The record is unclear as to whether a submission was made immediately following the change order; however, on April 15, 1987, Essex submitted a

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[1]After his final decision, the ACO modified the base against which interest was calculated. The interest amount originally found to be due, $1,086, was increased to $4,630.87.

"revision to our estimated cost proposal submitted . . . 19 June 1986." Once again, the letter stated that prices were based upon

> purchased orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor and engineering time and cost will be.

This letter held itself out to be a "claim" and was certified. It was never decided by the ACO. However, after an audit and several days of price negotiation, the parties executed an amendment on March 2, 1989. Upon Essex's submission of an invoice to the government for the amount due under the amendment to the contract, it received payment on March 16 or 17, 1989.

On May 2, 1989, Essex sent a letter to the ACO which held itself out to be a claim for interest under the CDA on the settlement sum. Essex based this claim for interest on its

revised cost proposal dated April 15, 1987. Once again, without ruling on whether the April 15, 1987 letter constituted a claim, the ACO allowed a limited amount of interest calculated from 20 days after shipment. This interest has not been paid.

C. THE "OVER AND ABOVE" WORK CHANGE ORDER

On September 24, 1986, the ACO issued another unilateral modification to the contract. This change order allowed the contractor to "propose additional repairs and reconfigurations to the mobile power units beyond those contemplated by the original contract." Essex, 22 Cl. Ct. at 762. Under this amendment, Essex submitted inspection reports which included proposals for "over and above" work on each unit. Each proposal indicated what the additional costs for repairs would be and requested government approval to proceed with the additional work.

For all "over and above" work proposed by the contractor that was authorized by the government, the price was later definitized.

The inspection reports prior to the March 27, 1987 report were not themselves labeled as "claims"; however, in a letter dated January 26, 1987, Essex referred to all of the prior inspection reports as claims. The March 27, 1987 report, and all subsequent reports, were characterized on their face as "claims." However, none of the reports demanded a decision by the ACO as all were mere proposals for additional work.

Because the government approved of the work proposed in the March 27, 1987 inspection report, price negotiations were initiated. These negotiations resulted in the execution of a bilateral modification to the contract establishing prices for the "over and above" work involved. Similarly, thirteen additional bilat-

eral modifications resulted from the over and above work proposed in subsequent inspection reports.

By letter dated April 13, 1987, the ACO informed Essex that the additional work set forth in the inspection reports could not yet be the subject of a claim since there was not dispute. On May 16, 1989, Essex submitted a claim for interest on the additional cost for the over and above work. The ACO never issued a decision on this claim. No interest amount was ever paid.

On April 5, 1991, Essex filed suit in the Claims Court seeking interest on the principal amounts due under the three change orders. Essex maintained that the interest should be calculated from the date it made submissions purporting to be claims under the CDA. The Claims Court held that Essex's submissions were not CDA claims entitling Essex to interest

because there was no dispute at the time they were made. In a motion for reconsideration of the Claims Court's judgment, Essex requested that it be allowed to amend its complaint to proceed under the Prompt Payment Act. The Claims Court held that the motion should be treated as a motion to amend but that it was untimely because it was filed after entry of judgment.

II. ISSUES PRESENTED

A. Does the executive branch have regulatory authority to define "claim" under the Contract Disputes Act?

B. Is the regulatory definition consistent with the statute and reasonable?

C. Has the regulation been properly applied in this case?

D. Did the Claims Court abuse its discretion in denying Essex's post-judgment motion to

amend its complaint to incorporate the provisions of the Prompt Payment Act?

III. ANALYSIS

A. Regulations Are Authorized by Statute

Essex argues that subsection 405(g) of the Office of Federal Procurement Policy Act (the "OFPP Act") limits the executive's authority to issue regulations to only those areas specified; and therefore, since the OFPP Act does not specify the CDA, the executive does not have authority to issue any regulations affecting the CDA. Subsection 405(g) of the OFPP Act states that "[e]xcept as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator [of OFPP]." 41 U.S.C. § 405(g) (1988).

Although the OFPP Act does not explicitly mention the CDA, subsection 405(a) of the Act nevertheless does broadly authorize the executive to issue regulations, including regulations affecting the CDA. Subsection 405(a) provides: "[T]he Administrator [of OFPP] may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed be executive agencies . . . ." 41 U.S.C. § 405(a) (1988). By its very terms, the CDA applies to contracts involving government procurement.[2] Accordingly, the executive,

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[2]Section 602 of the CDA, entitled "Applicability of law," provides:

> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract . . . entered into by an executive agency for --
>
> (1) the procurement of property, other than real property in be-

(continued...)

specifically the OFPP, does have authority to issue regulations implementing the CDA, and that authority is broad enough to encompass regulations defining "claim."

B. The Applicable Regulation Is Consistent with the CDA

Having determined that the OFPP has authority to issue the regulations, we must then determine whether the governing regulation as issued is consistent with the statute. In so doing, we must give deference to the interpretation of the statute of the agency charged with implementing it. Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467

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[2](...continued)
ing;
(2) the procurement of services;
(3) the procurement of construction, alteration, repair or maintenance of real property; or,
(4) the disposal of personal property. 41 U.S.C. § 602 (1988).

U.S. 837, 842-43 (1984). If the agency's interpretation of the statute as set forth in the regulation is reasonable, ordinarily it must be upheld. Id. at 844.

The statutory section at issue provides:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached and shall inform the contractor of his rights as provided in this chapter.

41 U.S.C. § 605(a) (1988). Included among the provisions of the FAR issued by the OFPP to implement this statutory section is a definition of the term "claim":

> Claim, as used in this subpart, means a written demand or written assertion by one of the contracting

> parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment of interpretation of contract terms, or other relief arising under or relating to the contract.

48 C.F.R. § 33.201 (1991).

Accordingly, with respect to a claim for money, three requirements are set forth in the regulation, all of which must be met for a submission to constitute a "claim": (1) the demand or assertion must be in writing, (2) the money must be sought as a matter of right, and (3) the writing must set forth a sum certain. As for the requirement that the claim be submitted in writing, the statute itself expressly requires a written submission.

The second two requirements are consistent with the ordinary plain meaning of the term "claim." The Webster's Ninth New Collegiate Dictionary (1990) defines claim as "to ask for especially as a right." Thus, the dictionary definition of "claim" supports the reasonable-

ness of the requirement that the money be sought as a matter of right. Moreover, for a payment of money to be sought as a matter of right, a sum certain naturally must be asserted. It is, after all, the defining measure of that right. Because neither the statute nor its legislative history otherwise defines "claim" or suggests that the word is intended to have some meaning other than its ordinary plain meaning, the FAR definition is reasonable, and must be upheld.

Essex next argues that because the executive failed "to comply with their rule-making procedures of the Administrative Procedures Act in either the drafting or application of [the regulations]," it has been denied "administrative due process."[3] But the Administrative

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[3]Essex also argues that the regulations are inherently ambiguous because subsequent language allows for an interpretation requiring a dispute for entitlement to interest. Essex alleges that it has a property right to interest on a

(continued...)

Procedures Act (APA) expersly exempts from its application "a matter relating to . . . public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2) (1988). Essex maintains that this exemption does not apply because the regulation at issue applies not only to procurement contracts but also to the contents of all agreements entered into by the government with private parties. This argument is unpersuasive because nothing in the APA limits the "public contracts" exemption, and the CDA plainly concerns, inter alia, government procurement contracts. Thus, in promulgating the FAR regulations, the executive was not required to follow APA requirements.

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[3](...continued)
claim and that it has been denied substantive due process because of the additional "dispute requirement" for entitlement to the interest. Because no "dispute requirement" is applied by us in the instant case, see infra, we need not address this argument.

C. The FAR Was Applied Properly in this Case

Essex seeks interests on amounts found due and paid as a result of the three settlement agreements. Essex alleges that the government owes it interest from the date it made submissions which purport to be, or which were later characterized by Essex as, "claims" under the CDA. With respect to the 100 Percent Replacement Parts Change Order and the Support Equipment Change Order, Essex alleges that its revised cost proposals dated April 13, 1987 and April 15, 1987, respectively, were claims entitling it to interest. With respect to the "Over and Above" Work Change Order, Essex alleges that each of its inspection reports was a claim entitling it to interest.

The CDA allows "[i]nterest on amounts found due contractors on claims . . . from the date the contracting officer receives the claim pursuant to section 605(a) of this title from

the contractor until payment thereof." 41 U.S.C. § 611 (1988). Thus, a necessary predicate to entitlement to interest is the submission of a claim.

To determine whether the submissions purporting to be claims did constitute claims under the CDA, we must ascertain whether the requirements of the statute and the FAR were satisfied. The statute requires that the claim be submitted in writing and that it be submitted to the contracting officer for a decision. 41 U.S.C. § 605(a). While the submissions at issue clearly satisfy the first requirement of a writing, it is not clear whether the second requirement is satisfied. The statute does not make clear whether a request for a decision must be made explicitly or whether it may be found implicit in the writing. We do not need to answer this question, however, because it is

clear that the FAR's requirements for a claim are not met by any of the submissions at issue.

In addition to the writing, the regulations require that a sum certain be sought as a matter of right. Because the April 13, 1987 submission for the 100 Percent Replacement Parts Change Order and the April 15, 1987 submission for the Support Equipment Change Order were mere "proposals" for "work to be performed," neither of these submissions asserted anything as a matter of right.

Likewise, the inspection reports submitted pursuant to the "Over and Above" Work Change Order, did not seek a sum certain as a matter of right. The reports served merely to propose additional repairs for possible approval by the government. As such, payment for any services subsequently approved could not possibly have been asserted as a matter of right in these reports.

Because the April 13, 1987 and the April 15, 1987 revised cost proposals and the inspection reports did not seek a sum certain as a matter of right, they were not claims under the CDA. Although the Claims Court used a distinctly different analysis to find that the submissions were not claims, the Claims Court judgment must be affirmed because its conclusion that interest must be denied was proper.

The Claims Court relied on Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), to determine that the submissions were not claims under the CDA. Essex argues that the court's reliance on Dawco was improper because neither the CDA nor its legislative history supports Dawco's requirements that the contractor refuse to participate in settlement negotiations or otherwise create a dispute before a CDA claim can exist and the right to interest is preserved.

Where, as here, the first three regulatory requirements themselves are not met, there is no need to discern whether a dispute exists. Here, considered against the first three FAR requirements, the submissions clearly are not claims.

Essex also argues that the ACO made a binding concession that the April 13, 1987 and the April 15, 1987 submissions were "claims" by allowing some interest on them. Essex asserts that this concession should entitle it to interest on those claims just as the government attorney's concession in Dawco entitled Dawco to interest on admitted claims. This argument is not persuasive. The submission in Dawco that was conceded by the government to be a claim was not in the record before the Federal Circuit or the Claims Court. Dawco, 930 F.2d at 879. In determining whether the absent submission was a claim, the Federal Circuit considered both the government's statements regarding the submission

and the description of the submission found in the record. Id. The government's "concession" was not dispositive of the issue, but merely provided additional evidence on which to base a decision. Moreover, that the government is bound by concessions in court of its attorneys does not mean it must also be bound by pre-litigation viewpoints of its contracting officer, who never addressed whether the submission was a "claim."

In the instant case, however, the submissions at issue are in the record. The trial judge independently assessed the adequacy of the submissions as "claims." In any event, the ACO's decision to allow interest that the government then refused to pay cannot be properly characterized as a "concession" by the government as a contracting party. Moreover, before the Claims Court and this court, the

government has consistently denied the existence of any claims.

D. Motion to Amend Complaint

In motion for reconsideration of the Claims Court's grant of summary judgment, Essex requested that it be allowed to amend its complaint to proceed not under the CDA but under the Prompt Payment Act (PPA), 31 U.S.C. § 3901, et seq. (1988). The Claims Court held that the motion should be treated as a motion to amend but that it was untimely because it was filed after entry of judgment.

On appeal, Essex argues that it had implicitly moved to amend its complaint prior to judgment. In support of this argument, Essex points to portions of the hearing record in which during argument on the motion the trial counsel discussed the PPA. Essex argues that those references to the PPA "should have been

construed as a motion to amend." Because no responsive pleading had yet been filed, Essex argues that it should be entitled to amend its complaint once as a matter of right. See RUSCC 15(a).

The Claims Court ruling must be upheld. Most importantly, a motion to amend made in the motion for reconsideration is clearly untimely. Id. Furthermore, Essex's "implicit motion" argument is unpersuasive. First, if Essex wanted to amend at that time, it could have either filed an amended complaint as a matter of right or requested leave of court to do so. Id. It failed to do either. Second, Essex has pointed to no authority, and we have found none, that requires the court to construe oral references to a particular statute during a hearing as a motion to amend the complaint. Indeed such a rule would make a mockery of pleadings and confront adverse parties with the potential for

endlessly shifting grounds. We will not condone this practice. Accordingly, the judge did not abuse his discretion in denying Essex's post-judgment motion to amend.

CONCLUSION

The executive branch has authority to issue regulations implementing the Contract Disputes Act, including OFPP's regulation defining the statutory term "claim." The regulatory definition of "claim is consistent with the ordinary plain meaning of the word, is otherwise consistent with the statute, and is reasonable. Because the submissions in this case do not satisfy all of the FAR's requirements for a claim, they were not claims. Accordingly, Essex is not entitled to interest based on these submissions. The grant of summary judgment of

no liability for the interest was therefore correct as a matter of law.

AFFIRMED

UNITED STATES COURT OF APPEALS FOR

THE FEDERAL CIRCUIT

91-5096

ESSEX ELECTRO ENGINEERS, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

Before ARCHER, Circuit Judge, BENNETT, Senior Cirucit Judge, MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration. The mandate will issue on May 19, 1992.

FOR THE COURT

Dated: May 12, 1992

Francis X. Gindhart
Clerk

cc: CHARLES E. RALEY
JOAN BERNOTT

ESSEX ELECTRO ENG V US, 91-5096
(CLM - 90-174 C)

****
* Note: Pursuant to Fed. Cir. R. 47.8, this *
* order is not citable as precedent. It is *
* a public record. *
****

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

91-5096

ESSEX ELECTRO ENGINEERS, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

A suggestion fo rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

_____
Francis X. Gindhart
Clerk

Dated: May 26, 1992

cc: CHARLES E. RALEY
JOAN M. BERNOTT

ESSEX ELECTRO ENG V US, 91-5096
(CLM 90-174 C)

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*
* Note: Pursuant to Fed. Cir. R. 47.8, this *
* order is not citable as precedent. It is *
* a public record. *
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IN THE UNITED STATES CLAIMS COURT

No. 90-174C
(Filed: April 5, 1991)

* * * * * * * * * * * * * * * * *

ESSEX ELECTRO ELECTRO ENGINEERS, INC.,

Contracts; Disputes Act; Whether a claim must involve a dispute; Interest as a basis for CDA claim.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * *

Charles E. Raley, Washington, D.C., for plaintiff. James S. Phillips, of Counsel.

Joan M. Bernott, with whom were Assistant Attorney General Stuart M. Gerson and David M. Cohen, Washington, D.C., for defendant. James P. Fuerstenberg, Office of Defense Logistics Agency, of counsel.

OPINION

BRUGGINK, Judge.

Defendant has filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, to consolidate with this proceeding two appeals pending before the Armed Services Board of Contract Appeals ("ASBCA"). Also pending are plaintiff's motion for summary judgement and its motion for sanctions. The principal sums due to plaintiff under three change orders have been paid as a result of administrative settlement. This action concerns plaintiff's attempt to recover interest on those settlement sums from the date it made submissions purporting to be claims under the Contract Disputes Act ("CDA").[4] The issue is whether

[4] 41 U.S.C. §§ 601-613 (1988).

plaintiff's submissions constitute claims cognizable under the act. Defendant contends that there was no dispute between the parties at the time plaintiff submitted its claims, and therefore the submissions were of no effect for purposes of commencing the running of CDA interest. For the reasons which follow, the court concludes that claims were not submitted, and that defendant's motion to dismiss, which will be treated as motion for summary judgement, is thus due to be granted. Defendant's motion to consolidate is denied. Plaintiff's motion for summary judgement and its motion for sanctions are denied.

FACTUAL BACKGROUND

Although defendant's motion is cast as one pursuant to RUSCC 12(b)(1), dismissal for lack of subject matter jurisdiction, the Federal Circuit has recently taught that a contention that an action is barred by the one year limita-

tions period does not raise a question as to the court's subject matter jurisdiction, but rather suggests that plaintiff has not stated a claim upon which relief can be granted. Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991). The same rationale would apply in the present circumstance. There is no question that the court has jurisdiction over claims brought under the CDA. The question is whether the facts alleged would constitute an actionable claim. Accordingly, defendant's motion will be treated as brought under RUSCC 12(b)(4). Since defendant has submitted materials outside the pleadings, its motion will be considered under RUSCC 56. Plaintiff has filed a motion for summary judgment with extensive exhibits. Defendant has responded to the motion and has offered numerous exhibits of its own along with an affidavit. The court concludes that the

issues are joined and can be completely disposed of on summary judgment.

After carefully examining the parties' submissions, including defendant's exceptions to plaintiff's proposed findings of fact, the court finds the facts to be as further described herein. The facts found are not controverted, and thus can form the basis for addressing the cross-motions for summary judgment.

While recognizing that the primary issue is whether the submissions at issue were "claims," the court will refer for convenience to those submissions in the same way plaintiff did at the time. The fact that plaintiff referred to a submission as a claim, or treated it as such, does not mean the court accepts that designation as having controlling legal significance.

The claims at issue arise from a single contract. On July 26, 1985 Essex Electro Engineers, Inc. ("Essex") agreed with the Naval

Regional Contracting Center[5] to overhaul and reconfigure 122[6] of the Navy's mobile electric power plants. During contract performance, several change orders were issued. The three claims at issue each relate to a particular type of increase in the contract work requirement brought about by these change orders, and the following discussion will track their separate chronologies. What all three share is a common assertion that an Essex submission to the Administrative Contracting Officer ("ACO") during implementation of the change orders constituted a claim within the meaning of the CDA, and thus began to accrue interest.

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[5]The procuring entity subsequently changed to the Naval Air Engineering Center. Both entities will be referred to throughout as "the Navy."

[6]The Navy terminated three units for its own convenience. Claims arising out of that partial termination are pending before the ASBCA.

1. The 100 Percent Replacement Parts Change Order

On November 20, 1985, the ACO sent a letter to Essex asking it to submit a cost proposal for a change order that would modify the contract to specify that certain listed parts would be subject to a 100 percent replacement requirement. The Navy specifically asked Essex to "furnish a cost proposal, for the inclusion of listed items into subject contract . . . . " Essex responded on February 14, 1986 with a letter from its President, F.J. Pawlowski. He wrote that "we are herewith submitting our estimated cost proposal [per unit] for the items to be added to the 100 percent Replacement Items Listing. . . . Please issue a contract change to incorporate selling price into the contract."

On October 7, 1986, the ACO unilaterally executed a change order, A00004, directing the addition of the 100 percent replacement parts

list. Price was to be negotiated: "An equitable firm-fixed price for this change order shall be negotiated with an appropriate Supplemental Agreement." The effective date of the change order was October 3, 1986.

On April 13, 1987, Essex submitted a revision to its earlier cost proposal. The revised cost proposal reduced somewhat the overall per unit cost for the change order. The letter from Pawlowski noted that "prices are based upon purchase orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor and engineering time and cost will be." The letter demanded the sum of $448,746.50, and closed with a certification paragraph plainly drafted to conform to the CDA. The letter also recites that "Essex's rights to a delay claim are reserved." Enclosed with the letter was a

Form 1411, "Contract Pricing Proposal Cover Sheet." The letter did not specifically call for a final decision by the ACO.

In February 1988, the parties executed an amendment to the contract (amendment A00026), which "definitized" change order A00004. The parties agreed on a "firm-fixed price" for the change order of $339,429. The substance of what was required, i.e., the replacement parts list, was the same as that set forth in A00004. The effective date of the amendment was set as December 31, 1987. In a separate but contemporaneous letter, Essex notified the Navy that its agreement to the amendment was without prejudice to its position that "government actions, inaction, and changes have delayed contract performance, and Essex has consistently reserved its delay and disruption costs in negotiating equitable adjustment settlements." The ACO agreed to this reservation of rights.

On February 29, 1988, Essex submitted an invoice for the entire amount of the amendment. Payment was made on March 14, 1988.

On May 25, 1989, Essex mailed a letter to the ACO which held itself out to be a "claim for interest due on the payment made on the certified claim arising from [Change Order A00004]. We request your final decision on this claim within sixty days in accordance with the [CDA]." The substance of the four-page submission was that Essex was entitled to interest on the entire amount invoiced as of April 13, 1987, the date of the revised cost proposal/claim. The amount claimed was $27,486.82.

By letter of July 27, 1989, the ACO indicated that a final decision was being prepared, but that Essex had to submit certain additional information. Essex responded timely but, for aught that appears, did not furnish any of the information requested.

On October 20, 1989, the ACO issued a final decision on the claim for interest. The decision granted a limited amount of interest based on the disputes clause in the contract, which allowed interest on claims "on the amount found due and unpaid from (a) the date the contracting officer receives the claim . . . or (b) the date payment would otherwise be due, if that date is later . . . ." 48 C.F.R. § 33.208 (1985) (Federal Acquisition Regulation ("FAR")). The ACO noted that Essex began incremental shipments of units on May 7, 1987, and completed shipments on March 15, 1989. Out of the conviction that, under ordinary circumstances, payment would have been due 20 days after acceptance of the shipment until final payment, which occurred on March 14, 1988. Because there had been interim progress payments, moreover, the ACO credited those payments to principal payments as they came due. A total of $1,086 was allowed.

The ACO decision lists dates of delivery for the units. Delivery began May 7, 1987 and continued until March 15, 1989, by which time all units had been delivered.

The ACO decision was subsequently modified on February 20, 1990. The method if calculating interest remained the same, but the base against which it was assessed increased. The revised amount of interest allowed was $4,630.87. That amount has not been paid.

2. The Support Equipment Change Order

On April 23, 1986, the Contracting Officer issued unilateral modification P00002. The purpose of the modification was to require the contractor to furnish material, parts, labor and services for the incorporation of "winterization kits" into each of the mobile power plants. It recited that it was an "unpriced Modification with a maximum amount of $581,940." The ACO was

delegated authority to negotiate an equitable firm-fixed price for the change order although the modification went into effect immediately.

The modification called for submission by Essex of a price proposal within 30 days. It was anticipated that after various negotiation steps a final modification, with price, would occur within 150 days of receipt of the proposal. Essex proceed to incorporate the kits into the units.

The documents and proposed findings do not make clear what occurred between April 23, 1986 and April 15, 1987. On the latter date, Essex submitted a "revision to our estimated cost proposal submitted . . . 19 June 1986." The letter recites that prices are based upon "purchase orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor

and engineering time and cost will be." The letter purported to be a claim and was certified by Essex, acting through President Pawlowski. He further recited that, because more than 150 days had elapsed since the contractor had submitted its cost proposal, Essex was no longer bound by the maximum amount of $581,940. Attached to the letter was an executed Form 1411, "Contract Pricing Proposal Cover Sheet." The total amount claimed was $720,546.91

Defendant performed an audit of the April 15 claim and issued it on December 23, 1987. After four days of negotiations, the parties agreed to an equitable adjustment in the amount of $629,000. Essex's acceptance, dated August 24, 1988, specifically reserved its "claim for delay and interest." In Amendment A00029, which was executed on March 2, 1989, the parties recited that all quantities had been delivered, with certain minor exceptions, and that claims

for delay and interest were preserved. Essex sent an invoice on February 6, 1989 in the amount of $603,851.04 for 117 winterization kits previously shipped and accepted. It received payment on March 16 or 17, 1989.

On May 2, 1989, Essex wrote a letter to the ACO claiming interest under the CDA on the settlement sum, commencing on April 15, 1987 and running until payment. The total amount of interest claimed as of that date was over $115,000. On February 20, 1990, the ACO wrote a "final decision" letter allowing interest on the same basis as that allowed with respect to the replacement parts change order. The result was that interest was calculated from 20 days after shipment, regardless of the fact that the shipments were not invoiced until much later, and ended when payments were made. Total interest allowed was $22,989.32. That amount has not yet been paid.

Essex's present claim is for approximately $125,000 in interest, which includes interest on the amount of the change order between April 15, 1987 and final payment in March 1989, along with interest on the interest allowed by the February 20 decision.

3. The "Over and Above" Work Change Order

On September 24, 1986, the ACO issued a unilateral modification to the contract, P00004. The total quantities under the contract were unaffected, but the work to be performed had the potential thereafter to increase. The amendment provided that the contractor could propose additional repairs and reconfigurations to the mobile power units beyond those contemplated by the original contract. If the "over and above" work was subsequently authorized, the price of the work would later be definitized.

Essex submitted an inspection report and a proposal for over and above work on each unit. Some reports dealt with several units. Apparently the unilateral modification of September 24, 1986 was in recognition of an ongoing practice because the first inspection report is dated February 13, 1986. It is typical of approximately half the reports: "In accordance with the contract, enclosed herewith is the Inspection Report for Serial [Unit] No. 4215. The additional cost for repair is $5,074.76. May we please have your approval so that we can start the work." The Government conducted price analyses on the proposals and presumably authorized additional work in each instance.

On January 26, 1987, Essex wrote the ACO concerning upcoming negotiations to price over and above work authorized up to that date. In his letter, President Pawlowski refers to the inspection as "claims."

Twenty-seven of the reports, beginning with the report of March 27, 1987, use language different than that of the first series of reports: "In accordance with the contract, enclosed herewith are Inspection Reports which contain a claim for equitable adjustment pursuant to the Contract Disputes Act. Reports and claims are submitted for the following [five] units." None of these reports are certified and none specifically call for an ACO decision on a claim. A comparison of the delivery dates with the dates of reports on the various units, as well as the working of the reports/claims, makes clear that at the time the reports were submitted, delivery could not have taken place. It is obvious that they are requests for permission to proceed with work. Most of the deliveries took place over several months and in many cases over a year after the dates of the reports.

Negotiations on pricing resulted, on May 6, 1987, in a bilateral modification to the contract (A00010) adjusting the price upward by $2,887.42 to cover additional work on the five units covered by the March 27 report. Subsequently, 13 additional bilateral modifications were executed reflecting agreement on pricing the over and above work for the remaining units.

The ACO responded to the March 27 report/claim with a letter dated April 13, 1987. The change in character of the inspection reports confused the ACO and led her to assert that the additional work could not yet be the subject of a claim since there was no dispute.

On May 16, 1989, Essex submitted a claim for interest on the over and above claims, in the total amount, at that time, of $103,991.40. The ACO indicated on two occasions that a final decision would be forthcoming on the interest claim, but no decision has been issued.

DISCUSSION

The plain import of the ACO's decisions with respect to the first two change orders is that she treated the April 13 and April 15, 1987 submissions, as well as the subsequent, separate interest claims, as claims under the CDA. Otherwise her reliance on the contract clauses relating to disputes and interest on claims would not have been relevant. She determined, in effect, that these submissions were claims, but held that interest would run only from the dates that interest would otherwise have been due under the contract. This analysis is based on FAR 52.233-1:

> (g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment.

The context of this excerpt from the disputes provisions makes it plain that interest only

comes into play if there is a claim under the CDA. The ACO's final decision awards interest based on alternative (2) of the interest clause because, under the contract, payment would not have been due until delivery and acceptance of the power units. The payments clause of the contract, taken from FAR 52.232-1, provides,

> The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract.

The contract also permits a 20 day grace period as a prompt payment discount. Based on the uncontested dates of delivery and acceptance, as well as the referenced contract provisions, the ACO calculated interest to begin running 20 days after acceptance even though invoices were not submitted at that time. As the ACO pointed out, invoices were not submitted because the prices for the changes had not been

definitized, due to no fault of Essex. Essex did not invoice the cost increases on these two change orders until virtually all deliveries had been completed. The ACO made the judgement, which the court finds eminently reasonable, that she would treat the invoices dated nunc pro tunc to the various dates of acceptance.

It did not become clear until oral argument, however, that the Government does not wish to defend the ACO's analysis with respect to the first two change orders. Counsel argued that since valid claims had not been submitted, the disputes clause should not be invoked. Moreover, the Government took the position as a matter of contract interpretation that any payment on the settlement prior to the final invoice date was improper.

To take the last contention first, the court disagrees as a matter of contract interpretation that the ACO incorrectly construed the

payment clause. The contract must be construed against the Government as drafter. The court finds that it would not have been within the contemplation of the parties that the requirement of an invoice would preclude an obligation of payment when delivery has been made and accepted, while the parties are delaying final price adjustment during negotiations, and while the government is analyzing pricing data. To hold otherwise would mean that a contractor would be obligated to finance government inventory for substantial periods of time due to a government-initiated change order.

The question then becomes, under any set of circumstances, would Essex have been entitled to interest from the submissions of the April 13 and April 15, 1987 letters relating to the replacements parts change order and the support equipment change order? (The court will deal separately with the amendments related to over

and above work.) As to these two change orders, it is theoretically not necessary, in disposing of plaintiff's claim for additional interest, to determine whether the April submissions were claims. It is the court's view that on if they were claims, the ACO correctly construed the statute and applicable FAR provisions to begin the commencement of interest with the date payment would otherwise be due under the contract (plus the 20 day prompt payment period).

During oral argument, however, plaintiff made it clear that in its view the entire quantum of the change order price adjustments was due immediately upon receipt of the April submissions, even if work had not commenced, much less delivery completed. To accept this argument would normally result in a windfall to the contractor. Interest under the CDA was meant to encourage prompt dispute resolution by having the Government compensate for use of the

contractor's money, not to punish the Government. See S. Rep. No. 1118, 95th Cong., 2d Sess. 32 (1978), reprinted in 1978 U.S. Cod Cong. & Admin. News 5235, 5266.[7]

Even though plaintiff's claims for additional interest on the underlying change order claims can be disposed of whether or not the claims were valid under the CDA, it becomes necessary to address that question for two other

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[7]The FAR provisions defining a claim clearly contemplate that a claim can arise in the absence of a presently due and owing sum of money. See FAR 52.233-1. The complement to that definition is found in the interest clause, however, which provides that interest should not be due on a claim any earlier than would normally be the case under the contract payment provisions. It is necessary for the court to address the question of whether a CDA claim in this tribunal must be monetized. Compare Continental Heller Constr. v. United States, 21 Ct. Ct. 471 (1990): Frawley v. United States, 14 Cl. Ct. 766 (1988); and Citizens Assocs., Ltd. v. United States, 12 Cl. Ct. 599 (1987) with Atkins Enterprises, Inc. v. United States, 15 Cl. Ct. 644 (1988). In the present circumstances, the obligation for payment had already arisen under the contract.

reasons. The first is that the primary basis of defendant's motion is that the submissions at issue were not claims within the meaning of the CDA, because at the time they were submitted, there was no dispute between the parties. The second reason, which will be addressed separately, is the fact that Essex submitted independent claims for interest. For those claims to have any validity, there must have been underlying quantum claims that triggered an obligation to pay CDA interest.

The CDA does not define the term "claim." It does, however, provide some guidance as the form in which a claim should be submitted. Section 6 requires that a claim be in writing and shall be "submitted to the contracting officer for a decision." 41 U.S.C § 605(a). The regulations applicable to the contract at bar do provide a definition of the term:

> "Claim," as used in this subpart, means a written demand or written

> assertion by one of the contracting parties seeking, as of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . However, a written demand or written assertion by the contractor seeking the payment of money exceeding $50,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

FAR 33.201. The reference in this definition to FAR 33.206(a) is to the standard process for initiating any new claim. It is not unique to vouchers or invoices. This definition therefore does not contemplate that vouchers metamorphose into claims merely be the reagent of dispute. A separate document constituting a claim must be submitted for resolution.

The Federal Circuit has recently resolved the question of whether this language at FAR 33.201 should be construed to limit claims to matters in dispute. In Dawco Constr., Inc. v. United States, No. 90-5074, slip op. at 11 (Fed Cir. April 3, 1991), the court held that "[c]learly, the FAR mandates that, inter alia, a claim must seek payment of a sum certain as to which a dispute exists at the time of submission." The court also relied on disputes clause language, also found at the same FAR provision, "that a 'request for payment that is not in dispute when submitted is not a claim for purposes of the Act.'" Id. From these phrases, the court concluded,

> The language is not ambiguous, and means what it says: A contractor and the government contracting agency must already be in dispute over the amount requested. Unilateral cost proposals or correspondence suggesting disagreement during negotiations, while they may ultimately lead to a dispute, do not, for purposes of the

> Act, satisfy the clear requirement that the request be in dispute.

Id. (emphasis in original).

The Federal Circuit cited as additional support its decision in Mayfair Constr. Co. v. United States, 841 F.2d 1576, 1577 (Fed. Cir.), cert. denied, 488 U.S. 980 (1988). From this citation, it is apparent that differences in the wording of contract disputes clauses would not be a basis for distinguishing results in earlier decisions, as plaintiff here urges. It is also thus unnecessary to address plaintiff's argument that the trend before the boards of contract appeals was to the contrary.[8] See also Hoffman

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[8]See e.g., A. & J. Constr. Co. IBCA No. 2269, 87-3 BCA ¶ 19,965; R.G. Beer Corp., ENG BCA No. 4885, 85-2 BCA ¶ 18162; Tera Advanced Servs. Corp., GSBCA No. 7109-NRC, 85-2 BCA ¶ 17,941; Lueltke Engineering Co., ENG BCA No. 4665, 82-2 BCA ¶ 15,851. But see Fortec Constr. Co., ASBCA No. 27601, 83-1 BCA ¶ 16,402. Plaintiff also contends that it would be an anomalous result if interest were disallowed under the present circumstances, when the

(continued...)

Constr. Co. v. United States, 7 Cl. Ct. 518, 523 (1985) ("in order to have a legitimate claim, a dispute must exist"); Esprit Corp. v. United States, 6 Cl. Ct. 546 (1984), aff'd 776 F.2d 1062 (Fed. Cir. 1985) ("Congress wanted interest to run against the Government only when the Government delayed in resolving disputes." (emphasis in original).

This court concludes from Dawco that the parties must have reached something approaching impasse on some of the elements of the contractor's demand before a claim can arise.[9] Each

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[8](...continued)
bulk of the billings were confirmed, since interest is earned under the CDA if the matter is in dispute and interest is earned under the Prompt Payment Act, Pub. L. No. 97-177, 96 Stat. 85 (1982), 31 U.S.C. §§ 1801-1806 (1988), upon submission of an invoice.

[9]The final sentence of the first paragraph of FAR 33.201 provides that a submission can be converted into a claim (after resubmission) if it "is not acted upon in a reasonable time." It is not
(continued...)

case must turn, therefore, on the result of a factual inquiry into circumstances surrounding the events leading to the demand.

Pursuant to Dawco, the letters of April 13 and April 15, 1987 were not claims. Although there was nothing tentative about the assertion of rights, although the CDA was invoked and although there was no question that a change order had taken place, it was not clear at that time that there would be a dispute as to the amount of compensation. The Government immediately commenced financial examinations of the claims, but the only indication that a dispute developed at any time is that Essex ultimately got less than the amounts demanded in the April letters. There is no evidence in the record that the parties were "discontinuing negotiations," or that a point was reached at which the

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[9](...continued)
clear what would constitute an unreasonable time.

"amount claimed was definitely in dispute." Dawco, slip op. at 14, 15. The materials had not been delivered at the time of the April letters. Both letters were sent to accompany contract pricing proposal cover sheets. For aught that appears, the April letters were "unilateral cost proposals," id. at 11, as to which the record shows no government rejection.

The only indication of a possible future dispute surrounding the April 13 and 15 letters was plaintiff's reservation of claims for delay or interest. Clearly a reservation of a potential claim, unrelated to the subject of the pending negotiations, cannot constitute a present dispute. While the plaintiff may have been entitled under the regulation to force the Government to either make a decision or incur interest charges, see supra note 6, the claims at issue here do not arise in that context.

The events leading up to the April 1987 letters are too similar to those outlined in Dawco to permit a different result. Although the precise nature of the numerous pieces of correspondence which the court found insufficient in that case is not clear, it is clear that they were found deficient in that they constituted proposals and points of departure for negotiations. In like manner, the April 1987 letters in this case transmit "revision[s] to . . . estimated cost proposal[s]." They were in response to invitations in the change orders to "negotiate[]" an equitable fixed price. The letter which the court in Dawco held to signal the existence of a dispute, although not part of the record, was conceded by the Government to be a claim and indicated to the court a condition in which "negotiations had clearly been abandoned, and the amount claimed was definitely in dispute." Dawco, slip op. at 15.

The same conclusion applies a fortiori with respect to the inspection reports arising out of the over and above work claims. The two different types of reports are quoted above. The first type, used until March 27, 1987, makes no reference to the CDA. Neither type was a present demand for money due. Unlike the first two types of change orders, where the Navy had already ordered the modified work to proceed, the inspection reports are no more than requests for permission to proceed with repairs. A description of proposed repairs and a request for permission to proceed is not a demand for payment. It is inherently conditional.

One issue remains. Plaintiff filed separate claims for recovery of interest on the quantum amounts claimed and ultimately settled. In her final decisions on those claims, as amended, the ACO decided that interest was due on the settlement of the 100 percent replacement

parts change order in the amount of $4,630.87. That decision was issued on February 20, 1990. On the same date, the ACO awarded interest on the settlement of the support equipment kit change order in the amount of $22,989.32. Neither of these amounts has been paid. The question becomes, is Essex entitled to assert a CDA claim for interest on those amounts?

Interest on claims brought pursuant to the CDA is controlled by section 12 of the act. 41 U.S.C. § 611. That section creates as a necessary condition to the award of interest that an amount be "found due [on the contractor's claim]." Plainly the claim contemplated by the act is one for an adjustment to the contract price. Interest is thus an adjunct to an underlying claim with respect to the principal liability. By the terms of the statute no interest arises absent some other claim. This is the plain import of Nab-Lord Assoc. v. United

States, 230 Ct. Cl. 694, 700, 682 F.2d 940, 944 (182). See also Hoffman Constr. Co., 7 Cl. Ct. at 522.

The submissions of May 2, 1989, May 16, 1989 and May 25, 1989 which seek interest on amounts paid for, respectively, support equipment, over and above work, and replacement parts, thus do not support an entitlement to money unless there had already been claims under the CDA. The fact that these submissions were properly certified and purport to be claims is irrelevant. If there were no CDA claims, a separate claim for interest would be ineffective, and if there had been CDA claims, a separate claim for interest would normally be a non-sequitur. Only if there had been a proper CDA claim, which was settled or acknowledged by the Government, but was then unpaid with respect to interest, would there be potential for a separate interest claim. In that event, the

court sees no proper, separate, CDA claim. The present circumstances do not give rise to just such a phenomenon, however, since the court had found that there were no underlying CDA claims.

CONCLUSION

Defendant's motion for summary judgement is granted. Plaintiff's motion for summary judgement is denied. The motion for sanctions is denied as being without merit. Defendant's motion to consolidate the two board actions with

this case is denied. The Clerk is directed to enter judgment dismissing the complaint. No costs.

ERIC G. BRUGGINK
Judge

IN THE UNITED STATES CLAIMS COURT

No. 90-174C
(Filed: April 25, 1991)

* * * * * * * * * * * * * *

ESSEX ELECTRO ENGINEERS, INC.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * *

ORDER ON RECONSIDERATION

Plaintiff has moved for reconsideration of the order of dismissal entered April 5, 1991. The motion correctly notes that the Prompt Payment Act was miscited. The correct citation is 31 U.S.C. §§ 3901-07 (1988). The Clerk is directed to substitute the attached page in place of the original.

The substance of the motion is that the Federal Circuit's opinion in Dawco Constr., Inc. v. United States, No. 90-5074 (Fed. Cir. April 3, 1991), upon which great reliance was placed by this court, is incorrectly decided. The question of whether there must be a "dispute" prior to submission of a claim was squarely addressed in the circuit court opinion. The support cited for that holding directly undercuts plaintiff's arguments to the contrary in this action. Although the motion for reconsideration questions reliance on that opinion in general, and specifically, reliance on Dawco without further input from the plaintiff, those criticisms are not a basis for reconsideration. This court is bound by the decisions of the Federal Circuit. The fact that plaintiff believes the holding at issue to be ill-considered does not alter this court's role. The result would have been no different if this

court had had the benefit of plaintiff's exegesis prior to ruling. Those contentions are properly addressed during an appeal.

In its conclusion, plaintiff for the first time requests, in the alternative, that it be allowed to amend its complaint to proceed under the Prompt Payment Act. Such a contingency should have been apparent much earlier. It was not timely requested, and the court feels no obligation to seriously treat with a motion to amend after entry of judgement has been directed. RUSCC 15(a). In any event, the plain import of Dawco is that, despite the interest provisions of the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1988), and despite the Prompt Payment Act, Congress allowed for a possible middle ground between claims and invoices - a grey area into which fall pre-dispute demands for payment, such as those here. This court has

no mandate to revisit whether that result is the correct one.

The court has considered the other ground argued and finds that they do not provide a basis for reconsideration.

ERIC G. BRUGGINK
Judge

Jan. 28, 1983

Mr. James T. Brannan
Director
Defense Acquisition Regulatory Council
Office of the Under Secretary of Defense
Washington, DC 20301

Dear Mr. Brannan:

This letter is in reply to your request for comments on proposed revisions to DAR coverage of the Contract Disputes Act of 1978 (DAR Case 80-86).

We have reviewed the proposed revision and have the following comments. The proposed DAR coverage does not properly implement the Contract Disputes Act. The Act does not require that a claim be "disputed by the other party", nor does it require that a claim be submitted under the Disputes clause. In addition, the proposed DAR coverage conflicts with OFPP Policy Letter 80-3, "Regulatory Guidance on P.L. 95-563, the Contract Disputes Act of 1978", and

Part 33, "Disputes and Appeal", of the FAR planning document.

I suggest that the existing coverage of the Contract Disputes Act be retained, rather than incorporating the proposed revision.

Sincerely,

Donald E. Sowle
Administrator

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. 92-263

In the Supreme Court of the United States

OCTOBER TERM, 1992

ESSEX ELECTRO ENGINEERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
JOAN M. BERNOTT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the definition of "claim" in the Federal Acquisition Regulation, 48 C.F.R. 33.201, is a valid exercise of regulatory authority for purposes of implementing the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	6, 8
Dawco Construction, Inc. v. *United States*, 930 F.2d 872 (Fed. Cir. 1991)	5, 9
S&E Contractors, Inc. v *United States*, 406 U.S. 1 (1972)	9

Statutes and regulations:

Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*	2
41 U.S.C. 602(a)	9
41 U.S.C. 605-609	10
41 U.S.C. 605(a)	2, 8
41 U.S.C. 605(c)(3)	4
41 U.S.C. 605(c)(5)	4
41 U.S.C. 607(g)	7
41 U.S.C. 607(g)(2)	7
41 U.S.C. 611	2
Office of Federal Procurement Policy Act, 41 U.S.C. 401 *et seq.*	8
41 U.S.C. 405(a)	6, 9
28 U.S.C. 1295(a)(3)	7
28 U.S.C. 2675(b)	8
28 C.F.R. 14.2(a)	8
48 C.F.R. 33.201	3, 6, 7, 8, 9
48 C.F.R. 33.201-33.214	10

Regulations—Continued:

Page

48 C.F.R. 33.208 3
48 C.F.R. 33.208(b) 4

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-263

ESSEX ELECTRO ENGINEERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 960 F.2d 1576. The opinion of the Claims Court (Pet. App. 33-69) is reported at 22 Cl. Ct. 757.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. A petition for rehearing was denied on May 12, 1992. Pet. App. 29-30. The petition for a writ of certiorari was filed on August 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into a contract with the Navy that required petitioner to overhaul and reconfigure 122 mobile electric power plants. Pet. App. 2. During the performance of the contract, the Navy issued three change orders. The Navy has paid all the principal amounts due to petitioner under these change orders. *Ibid.* The only issue is whether, under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, petitioner is entitled to interest calculated from the dates on which petitioner made various submissions to the Navy relating to the change orders.

The CDA provides for "[i]nterest on amounts found due contractors on *claims* * * * from the date the contracting officer receives *the claim* pursuant to section 605(a) of this title from the contractor until payment thereof." 41 U.S.C. 611 (emphasis added). Section 605(a) provides in pertinent part: "All *claims* by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. 605(a) (emphasis added). Thus, the CDA fixes the date on which a written claim is received by the contracting officer as the starting point for calculation of interest.

The CDA does not define the term "claim." That term is defined, however, in the Federal Acquisition Regulation (FAR). The FAR states that "claim"

> * * * means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. * * *

48 C.F.R. 33.201. The FAR further provides, in defining a "claim," that "[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." *Ibid.*

2. The first change order to petitioner's contract subjected certain listed parts to a 100% replacement requirement. The second change order required petitioner to incorporate "winterization kits" into the mobile power plants. Pet. App. 3, 6. In both instances, the Navy unilaterally modified the contract and asked petitioner to submit a price proposal for making the changes. Petitioner did so, stating that its proposed prices were based upon cost estimates. After negotiations, the parties entered contract amendments that provided for the changes to be made at prices lower than those proposed by petitioner. Petitioner later submitted invoices based on the amounts due under the amendments, and the Navy paid those amounts. *Id.* at 3-4, 6-7, 39-42, 44-47.

Petitioner then submitted written claims for interest on the principal amounts paid under the two change orders. Petitioner sought interest calculated from the dates upon which it had submitted the price proposals to the dates of payment. The contracting officer partially allowed the interest claims; she awarded interest calculated from 20 days after delivery and acceptance of the work to the dates of payment.[1] The Navy has not paid either interest award. Pet. App. 4-8, 42-44, 47.

[1] The contracting officer based the partial interest awards upon the disputes clause of the contract, included pursuant to 48 C.F.R. 33.208, which allows "interest on a contractor's claim on the amount found due and unpaid from (a) the date the contracting officer receives the claim * * *, or (b) the date payment otherwise would be due, if that date is later." Pet. App. 43. The contracting officer first determined that

3. The third change order required petitioner to submit inspection reports and to propose repairs and reconfigurations to the mobile power units "over and above" the work required in the original contract. Pet. App. 8. Petitioner submitted inspection reports and work proposals for each of the units. Approximately the first half of these inspection reports were not characterized by petitioner as claims when they were submitted, but the remaining 27 reports were so characterized. *Id.* at 49-50. Negotiations between the parties led to 14 contract modifications. *Id.* at 51.

Petitioner then submitted a written claim for interest on the principal paid for the "over and above" work. The contracting officer has not decided that claim. Pet. App. 51.[2]

4. The Claims Court granted summary judgment for the government. It held, first, that petitioner had not submitted "claims" within the meaning of the CDA for payment under the change orders. The submission of such claims, the court further held, was necessary to trigger the government's obligation to pay interest under the CDA. Pet. App. 33-69.

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payment was due 20 days after acceptance of the work and then, relying on subsection (b) of 48 C.F.R. 33.208, awarded interest from that date. Pet. App. 53.

[2] Because petitioner's claim sought more than $50,000, the contracting officer was required to decide the claim "within a reasonable time." 41 U.S.C. 605(c)(3). Under 41 U.S.C. 605(c)(5), "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim." Based on these provisions, the parties have treated the contracting officer's failure to decide petitioner's claim for interest on the amount paid under the third change order as a final decision denying that claim.

a. In determining that petitioner had not submitted "claims" for payment due on the change orders, the Claims Court relied on Federal Circuit precedent stating that "a claim must seek payment of a sum certain as to which a dispute exists at the time of submission." Pet. App. 60 (quoting *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872, 878 (Fed. Cir. 1991)). As to the first two change orders, petitioner argued that its price proposals constituted claims. The court rejected that argument, holding that the price proposals were not "claims" because there was no dispute between the parties at the time the proposals were submitted: "Unilateral cost proposals or correspondence suggesting disagreement during negotiations, while they may ultimately lead to a dispute, do not, for purposes of the [CDA], satisfy the clear requirement that the request be in dispute." Pet. App. 60-61 (quoting *Dawco Construction*, 930 F.2d at 878). The court also noted that accepting petitioner's argument as to when interest commenced would result in "a windfall to the contractor" because on the dates of its price proposals, petitioner had not begun the work or made delivery. Pet. App. 56. Similarly, the court held that petitioner's inspection reports and proposals for the "over and above" work under the third change order were not "claims" because they did not concern matters then in dispute between the parties. *Id.* at 66.

b. The Claims Court further held that petitioner's written claims for interest did not entitle it to interest under the CDA. "For those claims to have any validity," the court determined, "there must have been underlying quantum claims that triggered an obligation to pay CDA interest." Pet. App. 58. The court explained that the CDA "creates as a necessary

condition to the award of interest" the existence of "an underlying claim with respect to the principal liability." *Id.* at 67. Because "there were no underlying claims" by petitioner, the court concluded, the "separate claim[s] for interest" were "ineffective." *Id.* at 68, 69.

5. The Federal Circuit affirmed. Pet. App. 1-28. It upheld the Claims Court's holding that "a necessary predicate to entitlement to interest is the submission of a claim." *Id.* at 20. It also agreed with the Claims Court's determination that the cost proposals and inspection reports submitted by petitioner did not constitute "claims" for purposes of the CDA. Unlike the Claims Court, however, the Federal Circuit found "no need to discern whether a dispute exist[ed]" when those documents were submitted, *id.* at 23, because it determined that "they did not seek a sum certain as a matter of right as required by the Federal Acquisition Regulation (FAR) [48 C.F.R. 33.201] which implements the CDA." Pet. App. 1-2; see also *id.* at 22.

Further, the Federal Circuit rejected petitioner's argument that there is no statutory authority for the FAR provision defining "claim" for purposes of the CDA. The court observed that 41 U.S.C. 405(a) authorizes the Administrator of the Office of Federal Procurement Policy to "prescribe Government-wide procurement policies," and that "[b]y its very terms the CDA applies to contracts involving government procurement." Pet. App. 13. The court then determined that the FAR's definition of "claim"—which requires a claim to be in writing and to seek payment of money in a sum certain as a matter of right—is consistent with the CDA and therefore should be sustained under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Pet. App. 14-17. Having found that petitioner's submissions did not satisfy the regulatory requirements for "claim[s]," the court concluded that petitioner was not entitled to any interest on the amounts paid under the change orders.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, Congress has conferred exclusive jurisdiction upon the Federal Circuit to review all decisions of the Claims Court, 28 U.S.C. 1295(a)(3), and, with one narrow exception, all disputes under the CDA, 41 U.S.C. 607(g),[3] thereby establishing it as the primary tribunal for resolving issues of the kind presented here. Further review is therefore not warranted.

1. As explained, at p. 2, *supra*, the CDA provides for "[i]nterest on amounts found due contractors on claims * * * from the date the contracting officer receives the claim * * * until payment thereof." 41 U.S.C. 611. The FAR provides a definition of "claim" for CDA purposes, which, *inter alia*, requires that the claim seek payment as a matter of right in a sum certain. 48 C.F.R. 33.201. Petitioner does not contend that the price proposals and inspection reports that it submitted regarding the principal amounts due under the change orders satisfied the requirements of the FAR definition. Rather, petitioner argues that this definition is invalid because it is not authorized by the CDA. There is no merit to this argument.

The CDA specifies that "[a]ll claims * * * shall be in writing and shall be submitted to the contracting

[3] The sole exception is that decisions of the Tennessee Valley Authority Board of Contract Appeals are reviewable in district court. 41 U.S.C. 607(g)(2).

officer for a decision." 41 U.S.C. 605(a). Nothing in the CDA, however, suggests that these two requirements were intended as a complete definition of "claim," so that every form of writing submitted to the contracting officer for decision would constitute a "claim." The challenged regulation, FAR 33.201, fills out the definition by adding two further requirements: A claim must seek payment (1) "as a matter of right" and (2) "in a sum certain."

This case presents a paradigm of an agency's properly addressing by regulation a matter upon which the statute is silent or ambiguous. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Even petitioner concedes that there are "many accepted meanings" for "claim." Pet. 20. Both aspects of the FAR's definition of claim are plainly reasonable. The requirement that payment be sought "as a matter of right" distinguishes claims from mere offers or proposals submitted during negotiations, such as the documents petitioner submitted in this case. The requirement that "a sum certain" be sought is a familiar element of a claim in other areas of the law—for example, for administrative tort claims against the government. See 28 C.F.R. 14.2(a) (implementing 28 U.S.C. 2675(b)).

There is no merit to petitioner's argument (Pet. 32-39) that the FAR regulation defining "claim" is invalid because the CDA does not expressly authorize regulations defining its terms and the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. 401 *et seq.*, pursuant to which the regulation was adopted, does not expressly refer to the CDA. As the Federal Circuit correctly held (Pet. App. 13-14), the OFPP Act provides an ample basis for the regulation by broadly authorizing the Administrator

of the Office of Federal Procurement Policy to "prescribe Government-wide procurement policies" that "shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation." 41 U.S.C. 405(a). The regulation defining "claim" is part of the FAR and thus fully applies to government procurement contracts, which are also governed by the CDA. See 41 U.S.C. 602(a). The regulation defining "claim" is therefore valid, and the Federal Circuit properly held that the price proposals and inspection reports that petitioner submitted were not claims that triggered the obligation to pay interest because those submissions did not seek payment as a matter of right of a sum certain.[4]

2. The alternative ground adopted by the Claims Court also requires the rejection of petitioner's position. As that court correctly held (Pet. App. 60-63), it is well established under federal procurement law that in order for a document seeking payment to be recognized as a claim, there must be a dispute between the parties. In accordance with that principle, FAR 33.201 provides that "[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." 48 C.F.R. 33.201. The dispute requirement in the regulation prevents mere "[u]nilateral cost proposals," such as those petitioner submitted here, from being treated as claims. *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872, 878 (Fed. Cir. 1991). Were the law otherwise, such preliminary documents would pre-

[4] Contrary to petitioner's argument (Pet. 14-16), the decision below does not conflict with *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972). That decision preceded the adoption of the OFPP Act, the CDA, and FAR 33.201, and it did not address what constitutes a claim.

maturely trigger the full administrative and judicial review procedures for resolving disputed claims. See generally 41 U.S.C. 605-609; 48 C.F.R. 33.201-33.214. The Claims Court correctly concluded that there was no dispute regarding payment when petitioner submitted the documents it later characterized as "claims," and that those documents therefore did not constitute "claims" under the CDA.

3. Finally, petitioner errs in asserting (Pet. 39-65) that the result below is inequitable and deprives it of property without due process. Petitioner argues that the interest payments it seeks are necessary to compensate it for starting work under the change orders while the price for that work was being negotiated. Such compensation, however, is not constitutionally required. It is common for contractors under both private and government contracts to incur the costs of manufacturing an item before being paid by their customers when the item is purchased or accepted under an existing contract. Moreover, petitioner received interim progress payments for its work (Pet. App. 43), which is the appropriate way to address any inequity in this regard.

Indeed, as the Claims Court correctly perceived (Pet. App. 56), petitioner's theory would produce not equity but a windfall in this case. As to the first two change orders, petitioner sought interest calculated from the dates on which it submitted price proposals. Those submissions, however, occurred before petitioner started the work and well before the Navy accepted delivery. As to the third change order, petitioner sought interest from an even earlier date: the date on which it proposed work that the Navy had not yet authorized. Neither equity nor procurement law compelled the payment of interest from those dates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
JOAN M. BERNOTT
Attorneys

OCTOBER 1992

Supreme Court, U.S.
FILED
OCT 20 1992
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(3)

No. 92-263

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1992

ESSEX ELECTRO ENGINEERS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER, ESSEX ELECTRO ENGINEERS, INC.

CHARLES E. RALEY

Counsel of Record
for Petitioner
ESSEX ELECTRO
ENGINEERS, INC.

ISRAEL & RALEY, CHARTERED
1019 19th Street, N.W.
Penthouse One
Washington, D.C. 20036
(202) 659-9533

October 21, 1992

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TABLE OF CONTENTS

Page

A RECENT CONTRADICTORY DECISION OF THE FEDERAL CIRCUIT HIGHLIGHTS THE NECESSITY FOR GUIDANCE.....1

CONCLUSION.....10

APPENDIX.....Attached

Transamerica Insurance Corporation, Inc. v. United States, No. 92-5044 (Fed. Cir., Sep. 4, 1992).

TABLE OF AUTHORITIES

Page

COURT DECISIONS

Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed.Cir.1987).....7

Transamerica Insurance Corporation, Inc. v. United States, No. 92-5044 (Fed. Cir., Sep. 4, 1992).....PASSIM [Attached]

United States v. Yellow Cab Co., et al., 340 U.S. 543, 548-50, 71 S.Ct. 399, 95 L.Ed. 523 (1951).....3 n.2

STATUTES

Contract Disputes Act, 41 U.S.C. § 601, et seq.....PASSIM

Office of Federal Procurement Policy Act, 41 U.S.C. § 401, et seq.....1

Tort Claims Act, 28 U.S.C. §421, et seq.....3 n.2

REGULATIONS

FAR § 52.233-1: "Disputes (1984)".....1, 6

OTHER SOURCES

S.Rep. No. 1118, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 5235...8

A RECENT CONTRADICTORY DECISION OF THE FEDERAL CIRCUIT HIGHLIGHTS THE NECESSITY FOR GUIDANCE[1]

The United States, in its opposition, pays no heed to the CDA nor its legislative history nor to any of the contradictory and confusing precedents discussed in the Petition. Rather, the opinions below and the government here rely upon a single general procurement policy statement in the Office of Federal Procurement Policy ("OFPP") Act as a grant of unfettered legislative authority to the executive agencies. While completely ignoring the entire line of precedents on the standards for legislative authority, the executive branch argues that simply because its agencies' regulation may be a "part of the FAR" it is axiomatically "valid" in governing access to the rights and remedies mandated by Congress in the Contract Disputes Act ("CDA"). (Gov.Brf. pp. 8-9).

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[1] Essex Electro Engineers, Inc., is a small business with no parent nor any subsidiaries.

As a consequence of approving this self-fulfilling argument, the opinions below create and perpetuate a situation such that the private party's access to the rights and remedies afforded by the CDA is uncertain and subject to the dictates of the agencies themselves. This uncertainty is no more evident than in the complete conflict with the Essex opinions that is found in the recent decision of the Federal Circuit in Transamerica Insurance Corporation, Inc. v. United States, No. 92-5044 (Fed. Cir., Sep. 4, 1992). [Appendix, hereto].

Notwithstanding Essex's express intention to submit a "CDA claim," certified as required, the opinions below declare that a "claim" must also pass the litmus of the following elements before the submission may exist as a "claim" so that a resolution may be obtained under the CDA:

a) the agency must have chosen to express a "dispute" as to the subject of the "claim" before the "claim" itself has been submitted;

b) the contractor must have abandoned all negotiations before submission of the "claim"; and

c) the "claim" must consist of a written demand for the payment of a sum certain as a matter of right.[2]

The result of these definitional hurdles is that the private party who contracts with his government has no assurance as to when, if ever,

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[2] The government asserts another agency regulation apparently as an example of a restrictive definition imposed on a congressional use of the term "claim" in the Tort Claims Act. [Gov.Brf. p. 8]. However, the government's argument here ignores yet another precedent by this Court which rejected similar attempts by the executive to "whittle . . . down" the "clear and sweeping" breadth of the word "claim" in the Tort Claims Act which has a "common usage" and is not a "term of art." United States v. Yellow Cab Co., et al., 340 U.S. 543, 548-50, 71 S.Ct. 399, 95 L.Ed. 528 (1951).

his claim will be resolved on its merits. The private party must finance the government's liability for additional work ordered by the government until the government chooses to dispute the private party's right to be paid.[3] Further, the private party may not invoke the rights intended by Congress in the CDA unless he refuses to negotiate with the government.

The confusion and uncertainty demonstrated by the decisions set forth in Essex's Petition [pp. 39-57] must now be expanded to include

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[3] The government argues that being forced to finance the cost of performing unexpected additional work unilaterally imposed by a government change order is not inequitable because "[i]t is common" to incur the costs of an item until payment of the purchase price has been made "under an existing contract" or by "interim progress payments." (Gov.Brf.p. 10). A party may plan for and include in his price the carrying charges for known costs expected to be incurred until that price is paid. However, no plan can exist for unilateral change orders and, accordingly, Congress mandated the payment of interest in the CDA to reimburse the cost of financing such unexpected additional work.

Transamerica Insurance Corporation, Inc., supra., decided by the Federal Circuit on September 4, 1992 [Appendix, hereto]. In Transamerica, as here, a panel was called upon to review a decision of the Claims Court which had dismissed a contractor's complaint because of a Government motion that a CDA "claim" did not exist. In that case, as here, the claim consisted of a letter reciting a sum as a request for an equitable adjustment and included a certification consistent with the CDA.

In Essex a Government Form 1411 was submitted with the claim letters. In Transamerica the contractor waited six months before submitting the Form 1411. In Essex, the panel affirmed the dismissal based on labeling Essex's "claim" letter with the Form 1411 as an equitable adjustment "proposal." In Transamerica, the panel reversed the Claims Court and found a "claim" in the earlier letter and that the

subsequent Form 1411 was a submission of "supplemental information." [Transamerica, Appendix, pp. 6 and 8]. The Transamerica panel does not mention the agencies' "Disputes" Regulation nor any of the few citations upon which the Essex panel relied.

In Transamerica, the panel held that the intent of the contractor that "his letter serve as a statutory claim" was a controlling factor. [Id., Appendix, p. 22]. On the other hand, in Essex, notwithstanding Essex's consistent position that CDA claims were intended, the panel approved the concept that a "dispute" by the agency was the controlling condition precedent before the contractor's submission would be permitted to be a "claim." Rather than holding that the agencies' self-serving regulation vested control in the agency, the Transamerica panel held that--

> "This court will not require contractors to do more than to comply as fully and

> reasonably as possible with the statutory requirements of the CDA when this court has definitively stated that certain 'magic words' need not be used and that the intent of the 'claim' governs. See Contract Cleaning, 811 F.2d at 592."
>
> ***
>
> "'All that is required is that the contractor submit in writing to the contracting officer adequate notice of the basis and amount of the claim.' Id. at 592. This view is obviously consonant with the CDA itself which, besides the direction given in section 605(a)...does not address the specific requirements which a claim must contain." [Transamerica, Appendix, pp. 23-25].

The Essex panel also disregarded the contracting officer's repeated recognition of the existence of "claims" by Essex. [Pet.App. pp. 23-24]. Yet, in Transamerica, the panel reiterated the decision in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed.Cir.1987) that the letters "constituted a claim" as the Government "itself explicitly recognized." [Transamerica, Appendix, p. 26].

In the final analysis, the Transamerica panel directly contradicted the view of the Essex panel that approved a need to abandon negotiations in order for a "claim" to exist. While the Essex panel did not even address the intent of Congress in the CDA, the Transamerica panel held:

> "There is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution. S.Rep. No. 1118, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, states that the purpose of the Contract Disputes Act was to 'induce resolution of more contract disputes by negotiation prior to litigation....' All tribunals should foster negotiation as a mechanism for the resolution of disputes instead of erecting definitional structures which preclude, for their own validity, ongoing settlement measures." [Id., Appendix, pp. 26-27; emphasis supplied].

Any consistency between the Essex decision and the decision in Transamerica Insurance Corporation, Inc., cannot be perceived.

The confusion and contradictions generated by the executive's assumption of legislative

authority to restrict access to the CDA has resulted in the expenditure of an inordinate amount of time and money by private contractors, attorneys and the boards and courts in addressing useless government arguments and motions propounding the "claim" is not a "claim" theory. This exercise only serves to postpone resolving the merits of the claims while forcing the contractors to finance the burden of additional costs resulting from actions ordered or taken by the Government.

As here, the agencies are routinely ignoring the time limit in the CDA for resolving claims and are taking months and even years to enter into meaningful discussions to settle claims before litigation. The administrative boards are commonly taking one or more years to issue decisions in contract actions after hearings and briefs. This length of time is certainly exacerbated by the agencies' "claim is

not a-claim" arguments which postpone contracting officer decisions and require time to be devoted to pleadings, argument and decisions on agencies' dismissal motions. The intent of Congress that claims be submitted and settled as soon as possible with the accrual of interest as the incentive has been totally frustrated by the agencies' assumption of legislative authority to impose a definitional barrier that confuses and postpones access to the resolution procedures and rights afforded by the CDA.

CONCLUSION

Granting Essex's petition for a writ of certiorari is essential in order to provide definitive guidance by this Court for the first time on the standards for access to the claim resolution rights and remedies of the CDA and to end the rampant confusion and contradictions that exist in opinions of administrative boards and the courts. Inordinate time and expense is

being generated to resolve the existence of a "claim" rather than the merits of the claim itself. The necessity for guidance has been reinforced by the recent decision of the Federal Circuit in Transamerica, supra., entered after the instant Petition was filed.

Respectfully submitted,

By: _____
Charles E. Raley
Counsel for Petitioner

October 21, 1992

APPENDIX

---F.2d---
(Cite as: 1992 WL 213073 (Fed. Cir.))

TRANSAMERICA INSURANCE CORPORATION, INC., for and on behalf of Stroup Sheet Metal Works, Plaintiff-Appellant,
v.
The UNITED STATES, Defendant-Appellee.
92-5044.
United States Court of Appeals, Federal Circuit.
Sept. 4, 1992.

Before LOURIE, Circuit Judge, BENNETT, Senior Circuit Judge, and RADER, Circuit Judge.

BENNETT

DECISION

Transamerica Insurance Corporation appeals from a bench ruling of the Unites States Claims Court which granted the United States' motion to dismiss Transamericans complaint for lack of subject matter jurisdiction. The Claims Court found that the contractor's submissions did not constitute a claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, because they did not request a final decision from the contracting

officer. In the alternative, the Claims Court held that the contractor's claim certification was fatally flawed because it was unduly qualified. This court reverses and remands.

BACKGROUND

On September 15, 1987, the United States Army Corps of Engineers (Government) entered a contract with contractor Bodenhamer Building Corporation (BBC) for the construction of Bowley Elementary School at Fort Bragg, North Carolina, for the contract price of $3,804,000. On October 6, 1987, Bodenhamer entered into a subcontract with Stroup Sheet Metal Works for specified roofing work under the contract. Transamerica Insurance Corp., acting as surety, issued payment and performance bonding for the Bowley project.

Construction under the roofing contract began in late summer 1988 at which time Stroup discovered a disparity between the actual requirements of the subcontract and the roof plan on which it had based its bid and so informed BBC. In an August 2, 1988 letter, BBC notified the Area Engineer at Fort Bragg of the specification discrepancy, informing him that the roof plan was incorrectly scaled and that in actuality there was "approximately two times the square footage shown on the roof plan." BBC further notified the Government that this discrepancy would require additional material, labor and time, with delays affecting the completion date, and that as of 3 p.m. on August 2, Stroup's roofing operation had been stopped until direction could be received on how to proceed.

Responding to BBC in a letter dated August 3, 1988, the contracting officer's authorized representative stated that: (1) as the contractor, BBC was responsible for and should have reviewed the drawings and that "approval by the contracting officer shall not relieve the contractor from responsibility for any errors or omissions in such drawings;" (2) the contractor should have notified the contracting officer of these discrepancies earlier; (3) drawings which purport to be done to scale are not necessarily binding; (4) "the Contractor shall compare all drawings and verify the figures before laying out the work and will be responsible for any errors which might have been avoided thereby;" and (5) BBC was requested to submit a written corrective plan of action by August 10, 1988.

On August 9, 1988, BBC drafted two letters, one to its subcontractor Stroup and one to the contracting officer. The Stroup letter notified the subcontractor of the Government's denial of responsibility, instructed Stroup to continue to work on the project pending resolution of the claim, and offered to be the "conduit" for an equitable adjustment claim which Stroup could make to the contracting officer. The letter to the contracting officer stated BBC's position that the problem in the specifications arose due to errors in the contract drawings and thus that "this problem is a design error which is the responsibility of the Government and not the Contractor." BBC further stated, "[w]e can offer no written corrective plan of action inasmuch as we have done nothing wrong which needs to be corrected.... We recognize your letter as a directive ...

which constitutes a constructive change to the Contract. Accordingly, we hereby notify you that we are proceeding as directed by you and reserving all rights granted us under the Contract for an equitable adjustment in the Contract for all additional costs incurred, both direct and indirect as a result of this design deficiency."

In an August 26, 1988 letter, Stroup submitted to BBC a request for equitable adjustment of the subcontract, maintaining that the alleged defect in the roofing specifications increased the cost of performance by $241,919. As part of the equitable adjustment request, Stroup included a certification signed by Stroup's president. In a September 1, 1988 letter, BBC submitted Stroup's claim and request for equitable adjustment to the contract-

ing officer and included a certification executed by BBC's president.

On or about September 6, 1988, BBC notified the Government of its intention to abandon its contractual obligations and on September 8, 1988, the Government terminated the BBC contract for default. On September 15, 1988, Stroup learned that BBC's contract was in default and that the surety Transamerica would be taking over the project through completion contractor Sebco. Thereafter, Transamerica entered a ratification agreement with Stroup for the completion of Stroup's contractual obligations on the project. On November 7, 1988, Transamerica and the Government entered into a surety takeover agreement under which Transamerica agreed to take over and complete performance of the BBC contract. The agreement provided that the "surety shall have the right to pursue and

settle all existing and future claims that arise under this contract." On November 25, 1988, Stroup wrote the Chief of the Claims Section of the U.S. Army Corps of Engineers, urging him to make an expeditious decision on the pending equitable adjustment claim which had been submitted on September 1. On February 21, 1989, Stroup talked by telephone with both the Government and the former general contractor in an effort to get a final decision on its claim. After the conversation, on March 8, 1989, Stroup submitted to Transamerica and to the Government a revised cost summary on Form 1411 with a revised claim for equitable adjustment. On March 15, 1989, the contracting officer requested submission of supplemental information, including all cost and pricing data as well as a recertification of the claim by the surety. The contracting officer also

required that Transamerica adopt Stroup's claim as its own "since Stroup does not enjoy privity of contract with the Government" and that if the request for more time was "intended to assert a right to a contract time extension, Stroup and/or Transamerica should submit full justification for the requested time extension."

On March 28, 1989, the contracting officer issued a preliminary decision denying the request for equitable adjustment. The decision stated: "the claim is presented as a request for equitable adjustment and the basis of it is not clearly stated.... I acknowledge that the graphic scale provided was erroneous and reliance upon dimensions scaled from that undimensioned schematic plan would have resulted in quantities of the various elements of the roofing system which were substantially less than the quantities

actually required to be performed.... Under the circumstances of these bid documents, any reliance upon the Roof Plan for quantities of required work was imprudent and such reliance is at the risk of the bidder. Based on the above, it is my present intent to deny your claim; however, this is not my final decision. I will consider any additional information you may have or meet with you to discuss the claim." On May 17, 1989, Stroup's counsel took exception to the contracting officer's request for a second certification by Transamerica as requested in the March 15 letter. But on May 18, 1989, Transamerica submitted to the Government its certification of Stroup's claim signed by the Eastern Bond Claims Manager for Transamerica.

On July 5, 1989, Stroup completed all work required under the subcontract on the

Bowley project. On August 8, 1989, Transamerica submitted to the Government a contract pricing proposal cover sheet, revising the equitable adjustment claim upward to $265,549.89 plus interest. On April 13, 1990, the contracting officer issued a unilateral contract modification adjusting the contract price upward by $179,530.25 plus interest, based upon the contracting officer's determination that the erroneous roof scale constituted a changed condition entitling the contractor to an equitable adjustment of its contract amount. [FN1] On April 23-24, 1990, Stroup's counsel protested the "accord and satisfaction" language of the change order, but after the Government agreed that acceptance of the modification amount did not waive its right to pursue the remainder of the equitable adjustment costs on appeal, Transamerica and Stroup agreed to

accept the modification as partial payment only.

On October 24, 1990, Transamerica filed a complaint in the Claims Court, seeking a judgment against the Government in the amount of $86,019.64 plus interest (the difference between the amount awarded in the unilateral contract modification and the amount sought as equitable adjustment), reasonable costs and attorney fees and any other relief considered appropriate. On July 12, 1991, the court conducted a status conference which included arguments on jurisdictional issues, and on October 31, 1991, the court conducted a hearing on the Government's motion to dismiss, at the end of which the Claims Court pronounced its findings and conclusions from the bench, granting the United States' motion to dismiss for lack of subject matter jurisdiction and finding

that Transamericans letters (mainly the September 1, 1988 letter but also considering the August 26, 1988 letter) did not constitute a claim under the CDA because they did not request a final decision from the contracting officer. In the alternative, the Claims Court held that certification of the claim was invalid because language in the cover letter submitted with the certification impermissibly qualified it. On November 1, 1991, the complaint was dismissed on the jurisdictional grounds set out in the bench ruling. Transamerica appealed.

DISCUSSION

Standard of Review

"This court reviews Claims Court judgments to determine whether they are 'incorrect as a matter of law' or, premised on 'clearly erroneous' factual de-

terminations." Whitney Benefits Inc. v. United States, 926 F2d 1169, 1171 (Fed.Cir.), cert. denied, 112 S.Ct. 406 (1191), quoting Heisig v. United States, F.2d 1153, 1158 (Fed.Cir. 1983). The court reviews a dismissal for lack of jurisdiction de novo, jurisdiction being a question of law.

Request for a Contracting Officer's Final Decision

The main question before this court on appeal is whether the Claims Court erred in holding that BBC's September 1 submissions did not include a request for a final decision, either express or implied, as the Government alleges it was required to do under the CDA and case law. Transamerica argues that the claim as submitted by BBC to the contracting officer met all the requirements of the CDA

and thus conferred jurisdiction on the Claims Court. Section 605(a) of Title 41 U.S.C. states: "all claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." Section 605(a) by requiring submittal of a written claim "for decision" does not of itself add any authority to the argument that there must be an explicit request for a contracting officer's final decision. The statute's broad language demonstrates tht as long as what the contractor desires by its submissions is a final decision, that prong of the CDA claim test is met.

Besides the little actual guidance the statute provides on this issue, the Government in this case relies on this court's decision in Mingus Constructors, Inc. v. United States, 812 F.2d 1387

(Fed.Cir. 1987), for the statement that Mingus' letters sent to the contracting officer purporting to be claims under the contract did not qualify as claims because, in addition to noncompliance with other claim factors, "[t]hey do not request a decision from the contracting officer nor could they." Id. at 1395. In Mingus, this court affirmed the Claims Court's grant of summary judgment in favor of the Government on Mingus' equitable adjustment claim for damages arising out of a road construction contract on the Hopi Indian Reservation in Navajo County, Arizona. The court found inter alia, that certain letters from the contractor to the contracting officer which expressed an intent to file a claim and stated that the contractor was in the process of assessing impact from changed conditions, did not constitute claims. As Transamerica aptly

points out, Mingus turned upon this Court's consideration of "the special and limited circumstances under which a claim can be considered despite the execution of a release." Mingus, 1395. No similar issue exists in this case. As Mingus itself points out, "any extension of the opinion's language beyond what was needed to decide the facts of that case is properly characterized as dicta." Mingus, 1394. The language the Government relies on in Mingus is thus dicta, that case not turning on nor deciding the issue of whether or not a request for a decision of a contracting officer was necessary nor how specific that request need be, and this case does not deal with the consideration of claim attempted to be submitted after a release of claims has been executed.

In setting out the aforementioned language, the Mingus court cited the

Claims Court's decision in Hoffman Construction Co. v. United States, 7 Cl.Ct. 518 (1895). Mingus, 812 F.2d at 1395. The Claims Court in Hoffman stated: "(t)he court believes that in order to establish that a 'claim' has been submitted to a contracting officer the relief requested must include an expression of interest in a final decision by the contracting officer. Such a belief is supported by the language in section (c)(iii) of the Disputes Clause which states that a written claim shall be submitted to the contracting officer for decision. See also 41 U.S.C. § 605(a). 7 Cl.Ct. at 525-26 (emphasis added)." For this proposition, Hoffman relied on section 605(a), in and on the Court of Claims' decision in Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct.Cl. 1981).

As explained above, section 605(a) does not speak authoritatively to the issue sought to be proved by the Claims Court in this case. Furthermore, the citation to Paragon Energy for authority for this "requirement" is also off the mark. While it is true that the Paragon court considered the question of whether the written claim was "submitted to the contracting officer for a decision" under section 605(a), in that case the Court of Claims found that because the "letter expressed Paragon's interest in a 'final decision' with regard to its 'request for contract reformation," that sufficed to meet the standard of section 605(a). However, the Paragon court, in no way set up such a requirement under section 605-(a). It simply found that the particular factual showing in its case met the articulated statutory standard. Thus, the

Claims Court's decision in Hoffman does not provide support for the proposition that the claim must explicitly request a contracting officer's decision, but that all that need be shown is an "expression of interest," which may be made implicitly.

The Claims Court relied in its ruling in this case on Mingus and on its own previous opinion in Sun Eagle Corp. v. United States, 23 Cl.Ct. 465 (1991). In Sun Eagle, the Claims Court stated that "plaintiff did not expressly request a final decision in the November 29 letter, nor is there any implication that plaintiff desired a final decision. The letter sets forth a statement of rights and payment amounts and requests a meeting to discuss these issues. Indeed, it would be inconsistent to find that plaintiff impliedly requested a final decision when it ex-

pressly requested a meeting to discuss the situation." Although the Claims Court may have been correct in Sun Eagle in its assessment that there was no implication that the plaintiff sought a contracting officer's final decision, we must disagree with its general statement on the inconsistency between a request for a final decision and the suggestion of discussions on the issue.

In fact, there are two immediate distinctions between the Sun Eagle case and this case: first, in this case, it is impossible as a matter of logic and in light of the circumstances, to state that there is no implication that plaintiff desired a final decision; that is obviously what Stroup desired-- a final decision by the contracting officer on this equitable adjustment claim; second, the statement as to inconsistency between a request

for a final decision and the request for future meetings was clearly ruled on previously by this court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987), of which case, the Claims Court was obviously aware in its Sun Eagle opinion. We address these issues seriatim.

I.

The September 1 letter submitted to the contractor did not use the explicit words "we request a final decision from the contracting officer," but it is clear from the language of the letter itself that is what BBC wanted. BBC considered this letter a CDA claim filed with the authorized representative of the contracting officer. Clearly, BBC desired a response to this letter, and since BBC intended this letter to serve as a statutory claim, it also intended that the contract-

ing officer either grant or deny the claim in a final decision.

Further, the contracting officer was on notice that Stroup wanted a final decision on its claim dating back to Stroup's November 25, 1988 letter to the Chief of the Claims Section of the U.S. Army Corps of Engineers which requested a prompt decision on the pending equitable adjustment claim. Stroup's February 21, 1989 telephone conversation with the Government and the former general contractor also notified the Government that it sought a final decision on its claim. This court will not require contractors to do more than to comply as fully and reasonably as possible with the statutory requirements of the CDA when this court has definitively stated that certain "magic words" need not be used and that the intent of the

"claim" governs. See Contract Cleaning, 811 F.2d at 592.

The September 1 letter was in writing, was submitted to the contracting officer for a decision, requested payment of a sum certain, and gave the contracting officer adequate notice of the basis and the amount of the claim. This court is loathe to believe that in this case a reasonable contractor would submit to the contracting officer a letter containing a payment request after a dispute had arisen solely for the contracting officer's information and without at the very least an implied request that the contracting officer make a decision as to entitlement. Any other finding offends logic.

II.

As a general proposition, this court clearly stated in Contract Cleaning, "[w]e

know of no requirement in the Disputes Act that a 'claim' must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer adequate notice of the basis and the amount of the claim." Id. at 592. This view is obviously consonant with the CDA itself which, besides the direction given in section 605(a) as set out herein, does not address the specific requirements which a claim must contain. In Contract Cleaning, one of the appealed issues was whether certain letters submitted by the contractor requesting payment for contract amounts constituted CDA claims. The letters requested the payment of monies allegedly owed under the contract and indicated the contractor's willingness to work with the contracting officer to "finalize and conclude this mat-

ter," suggesting that the parties sit down, discuss, and resolve the matter through negotiation. Id. at 588-89. The Government in that case disputed whether any of the letters constituted CDA claims, but this court stated that "[t]he letters the appellant wrote to the government ... constituted a claim under the Disputes Act--as GSA itself explicitly recognized with respect to at least on of those letters." [FN2] The Contract Cleaning court, contradicting the Claims Court's statements in its ruling in this case, stated, "[t]he fact that in those letters the appellant frequently expressed the hope that the dispute could be settled and suggested meeting to accomplish that result does not mean that those letters did not constitute claims." Id. to 811 F.2d at 592. There is no necessary inconsistency between the existence of a valid CDA

claim and an expressed desire to continue to mutually work toward a claim's resolution. S.Rep. No. 1118, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.-C.A.N. 5235, states that the purpose of the Contract Disputes Act was to "induce resolution of more contract disputes by negotiation prior to litigation..." All tribunals should foster negotiation as a mechanism for the resolution of disputes instead of erecting definitional structures which preclude, for their own validity, ongoing settlement measures. In this case, the fact that BBC's submissions on behalf of Stroup stated that the contractor desired to meet and discuss the equitable adjustment request does not prevent the qualification of those requests as claims under CDA.

Transamerica states in its Reply Brief, "[i]t is the position of Trans-

america that the CDA statutory requirements as interpreted by this Court suggest a common sense analysis to determine whether (1) the contractor asserted in writing and with sufficient specificity a right to additional compensation, (2) the government disputed that right, and (3) the contractor communicated his desire for a contracting officer decision. This court agrees. Applying such a logical, common sense analysis in this case, BBC's submissions were sufficient to qualify as CDA claims.

Certification

Despite the fact that the Claims Court stated that once making a finding on the "claim" issue, it did not "deem it necessary to continue to argue the point of proper or improper certification," the court, in its ruling, reached as an alternative basis for its "claim" decision the

issue of the sufficiency of BBC's certification. The court found that the certification was defective because it was unduly qualified, relying for this finding on language found in the cover letter appended to the certification.

Section 605(c)(1) of Title 41 states on the issue of claim certification: For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable. The Court of Claims discussed the importance and purpose of the certification requirement in Paul E. Lehman, Inc. v. United States, 673 F.2d 352, (Ct.Cl.1982): An important objective of Congress was to

"discourag[e] the submission of unwarranted contractor claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 5, reprinted in [1978] U.S.C.C.A.N. 5235, 5239. One method of accomplishing this purpose was provided in section 5 of the Act, 41 U.SC.C § 604, which makes a contractor liable for the amount of any portion of its claim that it is unable to support because of misrepresentation or fraud. Another was the certification requirement. This court in Fidelity Construction Co. v. United States, 700 F.2d 1379, 1384 (Fed.Cir.), cert. denied, 464 U.S. 826 (1983), stated that the certification requirement was one of the "most significant provisions of the CDA" and that Congress viewed the certification requirement "as a mechanism to discourage the submission of unwarranted claims and encourage prompt settlements."

In this case there appears to be some inconsistency between what the Claims Court stated at the preliminary hearing and what it said in its ruling on the certification issue. The court stated at its July 12 hearing: "[y]ou've got an adequate certification as such, the real issue is whether the cover letter diminishes it to the extent that the general contractor could not be held liable... The certification itself sounds like it does meet the requirements of 605(c)... This certification is not qualified. It is accompanied by a cover letter that attempts to inch out of it. However, the individual has put his John Henry to the certification and I think could be held liable.

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The only purpose here that is served is to answer the question of has the con-

tractor put himself in a position where he could be prosecuted for making a fraudulent claim or statement to the contracting officer? ... this kind of self-serving other language that the contractor included in his cover letter, sounded like an attempt to diminish the certification a but nonetheless, the certification was made. (Emphasis added.)"

The clear import of the court's statements at the July 12 preliminary hearing was that in its opinion the certification was valid and that the major policy of certification of being able to hold a contractor personally liable for fraudulent claims was clearly satisfied in this case. The court clearly erred when it ultimately found that the BBC certification was impermissibly qualified by the cover letter's language.

In United States v. Turner Construction co., 827 F.2d 1554 (Fed.Cir.1987), alluded to by the Claims Court, the Government argued "that the certification must not only be submitted in good faith but must reflect the prime contractor's own belief that the submitted claim reflects the amount owed by the government and that to allow the prime to substitute the subcontractor's belief for its own in making a certification would make a sham of the certification requirement, regardless of the merits of the submitted claim, and would render meaningless the prohibition against direct appeals by subcontractors." 827 F.2d at 1561. The Turner court did not find this argument persuasive, stating "[w]e further agree ... that the certification requirement requires not that the prime contractor believe the subcontractor's claim to be certain, but

that the prime contractor believe that there is good ground for the claim." This court agrees with that enunciation. The language of BBC's September 1, 1988 cover letter, which the Government alleges qualified BBC's certification, is perfectly consistent with that standard set out in Turner. BBC stated in its letter, "[t]his claim is being filed by our subcontractor and inasmuch as they do not have contract privity with you, we are acting as a conduit on their behalf in this matter. We do not have access to their books and records and, therefore, cannot make any statement with respect to the amount of their claim. However, we have no reason to believe that their cost figures and delay estimates are incorrect."

This court has previously found that even when a proposed claim certification lacks certain elements specified in the

statutory standard of 41 U.S.C. § 605(c)-(1), the certification can still be valid if in "substantial compliance" with the statute and its purposes. In United States v. General Electric Corp., 727 F.2d 1567 (Fed.Cir.1984), this court ruled that although the certification failed to state the amount of the claim and did not include language to the effect "that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable," it contained the critical information required by the statute and was therefore in "substantial compliance" with it.

The Claims Court erred in relying upon the "qualified certification" issue as an alternative basis for its judgment. The certification made by BBC was binding, as the court correctly recognized at the July 12 hearing. Further, the allegedly

qualifying statement in the cover letter underscored BBC's belief that Stroup had "good ground" for its claim. Overall, the certification was, at the very least, in substantial compliance with the CDA's certification requirement. Thus, the Claims Court's reliance on the impermissible qualification of the certification as an alternative basis for its decision was clear error.

CONCLUSION

We reverse the Claims court's judgment that it did not have jurisdiction over Stroup's equitable adjustment claim. The claim, considered in context, contained a readily ascertainable request for a contracting officer's final decision. We further hold that BBC's certification was valid and not so qualified as to make it ineffective. The certification clearly complied with the chief policy underlying

the CDA certification requirement, that being the purpose of submitting the contractor to liability for fraud. We remand to the Claims Court for adjudication on the merits of the claim for equitable adjustment with interest.

COSTS

No costs.

REVERSED AND REMANDED.

FN1. The Modification stated, (i)t is understood and agreed that on account of the foregoing modification of said contract, additional time will not be allowed. It is further understood and agreed that the adjustment constitutes compensation for all coasts and markup directly and indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated."

FN2. Transamerica states in this case that the contractor's intent in its submissions "was not only discernable, but clearly understood by the contracting officer as evidenced by subsequent correspondence." Just as occurred in Contract Cleaning

Maintenance, Inc. v. United States, 811 F.2d 586 (Fed.Cir.1-987), the Government in this case referred to BBC's September 1 submission as a "claim." See March 15, 1989 Contracting Officer letter, and March 28, 19889 Contracting Officer letter. The fact that the Government referred to the operative submission(s) as "claims" was found persuasive by this court in its contract Cleaning analysis. Id. at 592.